

No. 16-4300, No 17-1054

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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MID-ATLANTIC RESTAURANT GROUP,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

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JOINT APPENDIX VOLUME II (20a-374a)

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Petition for Review of the November 30, 2016 Order of the National Labor Relations  
Board, Case No. 04-CA-162385

Kent E. Conway, Esquire  
Nathan J. Schadler, Esquire  
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Attorneys for Petitioner/Cross Respondent

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 4

MID-ATLANTIC RESTAURANT GROUP  
LLC d/b/a KELLY'S TAP ROOM

and

Case 04-CA-162385

ROBIN C. HELMS, an Individual

**COMPLAINT AND NOTICE OF HEARING**

This Complaint and Notice of Hearing is based on a charge filed by Robin C. Helms, an individual. It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 *et seq.*, and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Tap Room (Respondent) has violated the Act as described below:

1. The charge in this proceeding was filed by Robin L. Helms on October 21, 2015, and a copy was served on Respondent by first class mail on October 22, 2015.

2. (a) At all material times, Respondent, a Pennsylvania limited liability company, has operated a restaurant (the Restaurant) in Bryn Mawr, Pennsylvania.

(b) During the past year, Respondent, in conducting its business operations described above in subparagraph (a), received gross revenues in excess of \$500,000 and purchased and received at the Restaurant goods valued in excess of \$5000 directly from points outside the Commonwealth of Pennsylvania.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the following individuals held the positions set forth below opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Eugene Mitchell		Owner/Manager
Angelia Mitchell	-	Owner/Accountant
Ryan Henry	-	Manager

4. (a) In March and April, 2015, Respondent's employees, including Robin C. Helms, openly complained about shift schedules and the loss of pay resulting from the malfunctioning of Respondent's computer system.

(b) On or about April 30, 2015, Respondent discharged its employee Robin C. Helms.

(c) Respondent engaged in the conduct described above in subparagraph (b) because Robin C. Helms, and other employees engaged in the conduct described above in subparagraph (a), and in order to discourage its employees from engaging in protected, concerted activities.

5. By the conduct described above in paragraphs 4(b) and 4(c), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

6. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

**WHEREFORE**, as part of the remedy for the unfair labor practices alleged above in paragraphs 4 and 5, the General Counsel seeks an order requiring that Respondent reimburse Robin C. Helms for all search-for-work and work-related expenses regardless of whether he received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period; and the General Counsel seeks all other relief as may be just and proper to remedy the unfair labor practices alleged herein.

#### **ANSWER REQUIREMENT**

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an Answer to the Complaint. The Answer must be received by this office on or before December 31, 2015 or postmarked on or before December 30, 2015. Respondent should file an original and four copies of the Answer with this office and serve a copy of the answer on each of the other parties.

An Answer may also be filed electronically through the Agency's website. To file electronically, go to [www.nlrb.gov](http://www.nlrb.gov), click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the Answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an Answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the Answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an Answer to a Complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3)

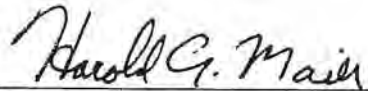


business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The Answer may not be filed by facsimile transmission. If no Answer is filed, or if an Answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Complaint are true.

**NOTICE OF HEARING**

**PLEASE TAKE NOTICE** that on **March 23, 2016 at 10:00 a.m.**, in a hearing room of the National Labor Relations Board, Region 4, 615 Chestnut Street, 7th Floor, Philadelphia, Pennsylvania, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Signed at Philadelphia, Pennsylvania this 17<sup>th</sup> day of December, 2015.



**HAROLD A. MAIER**

Acting Regional Director, Region 4  
National Labor Relations Board



**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 4**

MID-ATLANTIC RESTAURANT GROUP  
LLC d/b/a KELLY'S TAP ROOM

and

Case 04-CA-162385

ROBIN C. HELMS, an Individual

**ANSWER AND AFFIRMATIVE DEFENSES**

1. It is admitted that the charge was filed by Ms. Helms and that a copy of the charge was served on Respondent. It is denied that the charge is valid in that neither Ms. Helms nor the Board has offered any evidence to support the charge.

2.

(a). Admitted.

(b). Admitted.

(c). The averments of this Paragraph are denied as a legal conclusion.

3. Admitted in part and denied in part. The averments as to whether the individuals named fit within the statutory definitions stated is a legal conclusion, which is denied. It is admitted that the individuals named held the positions listed at the times relevant to this case.

4.

(a). Denied. The averments of this paragraph are denied as stated. There is no credible evidence that Robin Helms openly complained about these matters much less that there was any merit to such complaints. It is further denied that other unnamed employees of Respondent complained of such matters. Furthermore, it is impossible for Respondent to specifically answer vague, non-specific averments about unnamed employees.

(b). Denied. It is denied that Respondent discharged Robin C. Helms. Rather, Ms. Helms expressed her extreme dissatisfaction with her job when called to discuss her recent performance and ultimately decided to voluntarily separate from Respondent.

(c). Denied. The averments of this paragraph are denied as a legal conclusion and factually absurd. The end of Ms. Helms' employment with Respondent was her decision and furthermore based on performance issues. It was certainly not to discourage non-existent protected activities with other unnamed and unknown "other employees." Any such connection is entirely fiction and created by Ms. Helms as a money grab, which for reasons entirely unknown to Respondent, the Board has gone along with.

5. Denied. The averments of this paragraph are denied as a legal conclusion and factually absurd. It is unfathomable that the Complaint charges interference with concerted activities and has failed to identify a single employee, other than Ms. Helms whose credibility is compromised, who allegedly engaged in such activities.

6. Denied. The averments of this paragraph are denied as a legal conclusion and it presupposes that Respondent engaged in any illegal activity, which Respondent absolutely has not.

#### **AFFIRMATIVE DEFENSES**

7. Respondent hereby incorporates the above paragraphs as if fully set forth herein.

8. For a separate and distinct defense, Respondent asserts that Ms. Helms' claims are barred by the applicable statute of limitations in that the acts complained of occurred more than 6 months before the Ms. Helms' filing of the charge.

9. For a separate and distinct defense, Respondent alleges that Respondent's actions were committed in good faith and were a bona fide exercise of Respondent's legal rights.

10. For a separate and distinct defense, while denying that any improper factors motivated Respondent, Respondent asserts that Respondent would have taken the same employment actions as Respondent did in absence of any impermissible motivating factors.

11. For a separate and distinct defense, any claim for monetary relief by Ms. Helms must be reduced or denied due to or by reason of Ms. Helms' interim earnings and by any amounts Ms. Helms with reasonable diligence could have earned by failure or refusal of Ms. Helms to mitigate Ms. Helms' claim of monetary loss or by any failure or refusal of Ms. Helms for any reason whatsoever to be available for work.

12. For a separate and distinct defense, in the event Respondent discovers or otherwise learns of evidence after Ms. Helms' separation which would have led to termination of Ms. Helms, Ms. Helms shall thereby be barred or limited from recovery or remedy.

13. For a separate and distinct defense, any action taken by Respondent about which Ms. Helms complains was taken for legitimate nondiscriminatory, nonpretextual reasons and in taking such action, Respondent acted in good faith and on an honest belief that Respondent's actions were legally permissible.

14. For a separate and distinct defense, Respondent, at all times material herein, has made good faith efforts to comply with labor relations laws.

15. For a separate and distinct defense, Respondent affirmatively alleges that Ms. Helms was employed for no definite term and her employment was terminable at will.

16. For a separate and distinct defense, Respondent asserts that all actions taken by Respondent concerning Ms. Helms were taken in good faith and do not constitute willful and/or reckless violations of the relevant statutes.



17. For a separate and distinct defense, Respondent asserts that to the extent Ms. Helms was discharged, which Respondent denies, Ms. Helms's discharge was for good cause due to Ms. Helms's actions.

18. For a separate and distinct defense, Ms. Helms' claims are barred by the fact that Ms. Helms cannot show that the engaging in concerted activities, to the extent there were any such activities, was the "but for" cause of the end of her employment with Respondent.

19. For a separate and distinct defense, as to Ms. Helms' claims for equitable relief, Ms. Helms' claims are barred due to the availability of an adequate remedy at law.

20. For a separate and distinct defense, there was no concerted activity in this matter because Ms. Helms has failed to identify even a single other person involved in such activity.

21. For a separate and distinct defense, Respondent did not take any adverse employment action against Ms. Helms', who voluntarily left her position.

22. For a separate and distinct defense, even though Ms. Helms' was not terminated, Respondent was justified in terminating Ms. Helms' employment as a result of Ms. Helms' wrongful conduct in the performance of her employment, including suspected racial discrimination against patrons.

23. Respondent asserts that the Board's position that Ms. Helms' account is to be afforded vastly more weight than that of Respondent despite the lack of any support or corroboration for Ms. Helms' version is contrary to facts and law and is an outrageous misuse of governmental power.

24. Respondent asserts that it qualifies under the Equal Access to Justice Act and that the position taken by the Board in this matter is not substantially justified and no compelling

reasons exist that make awarding fees and costs unjust. Respondent intends to seek reimbursement for attorney's fees and costs incurred in this matter after it prevails.

WHEREFORE, having fully answered Ms. Helms' Complaint, Respondent prays that Ms. Helms take nothing by this action, that the Court dismiss the Complaint in its entirety with prejudice and that the Court grant Respondent its attorney's fees, costs and any and all further relief to which they may be justly entitled.

CONWAY SCHADLER

By: 

Kent E. Conway, Esquire

Nathan J. Schadler, Esquire

PA Attorney I.D. No. 88063/92885

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Attorneys for Respondent

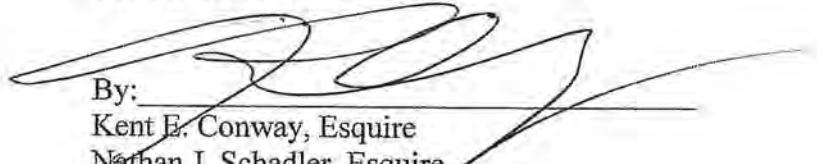
**CERTIFICATE OF SERVICE**

I, Kent E. Conway, certify that a true and correct copy of the foregoing Answer was served via First Class U.S. Mail upon the following:

Harold A. Maier  
Acting Regional Director  
National Labor Relations Board  
Region 4  
615 Chestnut Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19106-4404

Robin C. Helms  
72 N. Sycamore Avenue  
Clifton Heights, PA 19018

CONWAY SCHADLER



By: \_\_\_\_\_  
Kent E. Conway, Esquire  
Nathan J. Schadler, Esquire  
PA Attorney I.D. No. 88063/92885  
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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
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MID-ATLANTIC RESTAURANT GROUP  
LLC d/b/a KELLY'S TAP ROOM

and

Case 04-CA-162385

ROBIN C. HELMS, an Individual

**RESPONDENT'S MOTION FOR A BILL OF PARTICULARS**

Respondent, by and through its undersigned attorneys, hereby files the following motion for a Bill of Particulars and in support thereof avers as follows. Respondent asserts that there was not sufficient information in the Complaint in this matter for it to properly defend itself against the allegations made. The Complaint charges that Robin C. Helms was terminated for engaging in "concerted activity" under the NLRA. However, the Complaint is entirely devoid of any assertion of how Ms. Helms' actions constituted "concerted activity" or could have been construed as such.

The NLRA does not precisely define what exactly constitutes "concerted activity" within the meaning of the Act. See NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 830-31 (1984) ("The term 'concerted activit[y]' is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals."). While there are circumstances in which the actions of an individual can be part of concerted activity, there must be some link to fellow employees. See id. at 831-833.

The Supreme Court has stated that "at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity." See id. at 833 n. 10. Therefore, if an employer were to "discharge an employee for purely personal 'gripping,' the employee could not

claim the protection of § 7.” See id. There must be some link between the employee complaining and other employees or the activity of the employee cannot be said to be covered by the protections of the NLRA. See Snyder v. Dietz & Watson, Inc., 837 F. Supp. 2d 428, 454 (D.N.J. 2011) (“An individual’s action, even if presumably of interest to other employees, is not in itself ‘concerted activity’ under the NLRB.”).


The Board has made no effort of any kind to allege any facts, which suggest that the conduct of Ms. Helms as alleged, even if true, was anything more than her individual complaints to her employer. The Board has failed to allege a single other affected employee or that Ms. Helms was taking action on behalf of anyone other than herself. Respondent is unable to properly defend itself without proper notice of the facts leading to the conclusion that there was “concerted activity” in this matter.

Absent these particulars, the charges against Respondent are not sufficiently precise to allow Respondent to prepare for a hearing. A bill of particulars allows a respondent to identify with sufficient particularity the nature of the complaints pending against respondent, thereby enabling him to prepare for trial and to prevent surprise.

Respondent seeks only critical information, i.e. the actions taken or considered taken for the interest of anyone other than Ms. Helms and the facts to support that notion. This is a narrow and precise item of information that, in fairness, should be made available to Respondent. As drafted, the Complaint does not supply enough information for the Respondent to properly challenge the Board’s characterization of the Ms. Helms’ conduct as it allows for some as yet undisclosed reasoning for alleged concerted activity. That is not sufficient to satisfy due process concerns.

The Board has done nothing to provide the minimum level of particularity to the Complaint. Without the requested Bill of Particulars, the Respondent is unable to adequately prepare for a hearing. It is therefore respectfully submitted that this motion be granted.

CONWAY SCHADLER

  
By: \_\_\_\_\_  
Kent E. Conway, Esquire  
Nathan J. Schadler, Esquire  
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Blue Bell, PA 19422  
(P) (484) 997-2040  
(F) (484) 997-2041  
Attorneys for Respondent



**CERTIFICATE OF SERVICE**

I, Kent E. Conway, certify that a true and correct copy of the foregoing Motion was served via First Class U.S. Mail upon the following:

Harold A. Maier  
Acting Regional Director  
National Labor Relations Board  
Region 4  
615 Chestnut Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19106-4404

Robin C. Helms  
72 N. Sycamore Avenue  
Clifton Heights, PA 19018

CONWAY SCHADLER

By: 

Kent E. Conway, Esquire  
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PA Attorney I.D. No. 88063/92885  
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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
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MID- ATLANTIC RESTAURANT GROUP LLC  
d/b/a KELLY'S TAP ROOM

and

Case 04-CA-162385

ROBIN C. HELMS, an Individual

**GENERAL COUNSEL'S OPPOSITION TO  
RESPONDENT'S MOTION FOR A BILL OF PARTICULARS**

On December 17, 2015, the Acting Regional Director for the Fourth Region of the National Labor Relations Board issued a Complaint and Notice of Hearing in the above-captioned matter. It alleges that Respondent, Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Tap Room, engaged in certain acts and conduct in violation of Section 8(a)(1) of the Act. On January 27, 2015, Respondent forwarded a Motion for A Bill of Particulars to the Chief Administrative Law Judge. Counsel for the General Counsel submits that Respondent's Motion should be denied.

The Complaint alleges, in pertinent part, that:

4. (a) In March and April, 2015, Respondent's employees, including Robin C. Helms, openly complained about shift schedules and the loss of pay resulting from the malfunctioning of Respondent's computer system.

(b) On or about April 30, 2015, Respondent discharged its employee Robin C. Helms.

(c) Respondent engaged in the conduct described above in subparagraph (b) because

Robin C. Helms, and other employees engaged in the conduct described above in subparagraph (a), and in order to discourage its employees from engaging in protected, concerted activities.

In its Motion, Respondent contends "that there was not sufficient information in the Complaint...for it to properly defend itself against the allegations made;" "the Complaint is totally devoid of any assertion of how" Robin C. Helms' actions constituted or could have been construed to be, 'concerted activity;' no facts are alleged which suggest that her conduct "as alleged, even if true, was anything more than her individual complaints to her employer;" no other affected employee is alleged and it is not alleged that she "was taking action on behalf of anyone other than herself;" "Respondent is unable to properly defend itself without prior notice of the facts leading to the conclusion that there was 'concerted activity' in this matter;" the allegations "are not sufficiently precise to allow Respondent to prepare for a hearing;" Respondent "seeks only critical information...that, in fairness, should be made available to Respondent;" "the Complaint does not supply enough information for...Respondent to properly challenge the Board's characterization of" her conduct as concerted so it "is not sufficient to satisfy due process concerns;" and the Complaint does not "provide the minimum level of particularity," making Respondent "unable to adequately prepare for a hearing."

Section 102.15 of the Board's Rules and Regulations provides, in part, that "The complaint shall contain...a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." It is not the function of a pleading to provide evidentiary matter. Thus, a bill of particulars is only justified when the complaint is too vague for Respondent to meet the General Counsel's



case. *Drukker Communications, Inc. v. N.L.R.B.*, 700 F. 2d 727 (D.C. Cir. 1983); *North American Rockwell Corp. v. N.L.R.B.*, 389 F. 2d 866 (10th Cir. 1968).

The pleadings at issue herein advise Respondent of the nature of the violation alleged, the manner in which the violation was committed, and the approximate date of the alleged unlawful conduct. See, e.g., *Dal-Tex Optical Co.*, 130 NLRB 1313, 1313-14 fn. 1 (1961); *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 295 (1960). While Robin C. Helms was the only employee who engaged in protected, concerted activities named in the Complaint, this is because the sole unfair labor practice issue concerns her discharge. Accordingly, the Complaint is sufficient to acquaint Respondent with the issues to be considered at trial and is sufficiently specific to enable Respondent to fully litigate the alleged unfair labor practice and to defend against the allegations made in the Complaint. See *North American Rockwell*, *supra*; *Morrison-Knudsen Co.*, 210 NLRB 174, 174 fn. 1 (1974); *Sunbeam Lighting Co.*, 136 NLRB 1248, 1248 fn. 2 (1962); *Walsh-Lumpkin*, *supra*; *Chambers Mfg. Corp.*, 124 NLRB 721, 722 (1959), *enfd.* 278 F. 2d 715 (5<sup>th</sup> Cir. 1960); see also *Dal-Tex*, *supra*.

Respondent, in effect, is seeking evidence and pre-trial discovery, which the Board long has prohibited. *North American Rockwell*, *supra*; *Spiegel Trucking Co.*, 225 NLRB 178, 178 fn. 5 (1976); *Del E. Webb Construction Co.*, 95 NLRB 377, 377 fn. 2 (1951). The General Counsel is not required to supply Respondent with a detailed analysis of his proof prior to the opening of the hearing. *Spiegel Trucking*, *supra*; *Morrison-Knudsen Co.*, *supra*. It is submitted that paragraph 4 of the Complaint comports with the standards for complaints set forth in Section 102.15 of the Board's Rules and Regulations.

In view of the foregoing, Respondent's Motion for a Bill of Particulars should be denied.

Dated at Philadelphia, Pennsylvania, this 9th day of February, 2016.

Respectfully submitted,

/s/ *David Faye*

DAVID FAYE  
Counsel for the General Counsel  
National Labor Relations Board

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

MID-ATLANTIC RESTAURANT GROUP  
LLC d/b/a KELLY'S TAP ROOM

Case No. 04-CA-162385

and

ROBIN C. HELMS, an individual

ORDER DENYING RESPONDENT'S MOTION FOR A BILL OF PARTICULARS

Respondent has moved for a bill of particulars. The General Counsel filed an opposition to the motion. The Board's procedural rules provide:

**Sec. 102.15** *When and by whom issued; contents; service.*—After a charge has been filed, if it appears to the Regional Director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 14 days after the service of the complaint. The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

The complaint alleges in pertinent part that Respondent violated Section 8(a)(1) in discharging Robin C. Helms on April 30, 2015 for engaging in protected concerted activity. As to Ms. Helms' protected concerted activity, the complaint states that:

In March and April 2015, Respondent's employees, including Robin C. Helms, openly complained about shift schedules and the loss of pay resulting from the malfunction of Respondent's computer system.

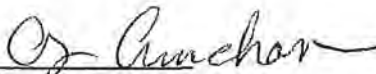
Respondent seeks the identity of any other employee affected by the issues about which Ms. Helms allegedly complained. It contends that without this information it cannot defend against the General Counsel's characterization of Ms. Helms' conduct as concerted activity.

I deny Respondent's motion for a bill of particulars because the complaint is sufficient to acquaint Respondent with the issues to be considered at trial and to defend against the allegations made in the complaint. The General Counsel is not required to plead the evidence that supports these allegations. Respondent is privy to the reasons for which Ms. Helms was discharged. Thus, it should either be able to elicit evidence that either it discharged Ms. Helms for reasons other than her alleged concerted complaints, or argue that under the existing caselaw her complaints do not constitute protected concerted activity.



THEREFORE, Respondent's motion for a bill or particulars is DENIED.

Dated at Washington, D.C.,  
February 12, 2016

  
Arthur J. Amchan  
Deputy Chief Administrative Law Judge

JD-50-16  
Bryn Mawr, PA

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

MID-ATLANTIC RESTAURANT GROUP  
LLC d/b/a KELLY'S TAPROOM

and

Case 04-CA-162385

ROBIN C. HELMS, AN INDIVIDUAL

*David Faye, Esq.*,  
for the General Counsel.  
*Nathan Schadler, Esq.*,  
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on March 23-24, 2016. Robin C. Helms (Helms) filed the charge on October 21, 2015,<sup>1</sup> and the General Counsel issued the complaint on December 17, 2015.

The complaint alleges that the Respondent<sup>2</sup> discharged Helms on April 30, 2015, in violation of Section 8(a)(1) of the Act.<sup>3</sup>

On the entire record,<sup>4</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

---

<sup>1</sup> All dates are in 2015 unless otherwise indicated.

<sup>2</sup> The Respondent will be referred to herein as the Respondent or Kelly's.

<sup>3</sup> The discharge of Helms is the only matter alleged to be an unfair labor practice in the complaint. The General Counsel did not make any amendments to the complaint at the trial alleging additional unfair labor practices. I indicated at the hearing that I would not consider anything to be an unfair labor practice unless it had been alleged as such in the complaint (Tr. 52-53).

<sup>4</sup> The record contains an affidavit executed by Eugene Mitchell (GC Exh. 7). While this document was identified on the record, it was not introduced into evidence at the hearing. Consequently, I have not read or considered GC Exh. 7 and I order that it be stricken from the record.

## FINDINGS OF FACT

## I. JURISDICTION

5 The Respondent, a limited liability company, operates a restaurant (Kelly's) in Bryn Mawr, Pennsylvania. Annually, the Respondent, in conducting its business operations described above, receives gross revenues in excess of \$500,000 and purchases and receives at Kelly's, goods valued in excess of \$5000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

## Credibility of Witnesses

15 In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007). In addition, I have carefully considered all the testimony in contradiction to my factual findings and have discredited such testimony.

25 The General Counsel's case rests in large part on the testimony of Helms. I found Helms to be a credible witness and rely on her testimony substantially with regard to factual findings. Throughout the trial her demeanor reflected a sincere desire to testify truthfully and her testimony had sufficient detail to render it reliable. Helms testimony reflected that she remembered in detail the events that she described. In addition, she testified consistently on both direct and cross-examination. In its brief, the Respondent contends that because Helms has a financial interest in the outcome of this proceeding and her testimony, for the most part, is not corroborated by the testimony of other witnesses, it should not be credited. The Board has long held, however, that the uncorroborated testimony of an alleged discriminatee can constitute substantial evidence in support of the allegations of the complaint when such testimony is found to be credible and is not undermined by contradictory evidence. *Ferguson Enterprises, Inc.* 355 NLRB 1121 fn. 1 (2010); *Li'l General Stores Inc.*, 170 NLRB 867 fn. 1 (1968), enfd. in relevant part 422 F.2d 571 (1970).

40 I found the testimony of the Respondent's main witnesses, Eugene Mitchell and Angelia Mitchell to be generally unreliable and do not credit it to the extent that it conflicts with Helms' testimony. As will be set forth in further detail herein, their testimony is not mutually corroborative with respect to critical events and is generally implausible. The brief testimony of Respondent's witness Ryan Henry, contradicts the testimony of the Mitchells regarding the meeting at which Helms was discharged. In addition, as will be discussed further herein, Henry's recall with respect to much of his testimony was very limited and I found his testimony to be



unreliable. I do not credit his testimony to the extent it conflicts with that of Helms. I will discuss the credibility of other Respondent witnesses as necessary later in the decision.

## Facts

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### Background

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Eugene Mitchell is the majority owner of the Respondent which, as noted above, operates Kelly's restaurant. Kelly's is located in Bryn Mawr, Pennsylvania, near the Villanova University campus. Mitchell also has an ownership interest in two other restaurants, Flip and Bailey and Garrett Ale House, both of which are located approximately a mile from Kelly's. Mitchell's wife, Angelia Mitchell, is the operations manager of Kelly's. During the time relevant to the complaint, there was also an on-site manager at Kelly's. Ryan Henry was the manager at Kelly's from approximately December 2014 until the fall of 2015. Prior to that time, Kristin Lang was the manager of Kelly's. The parties stipulated that Eugene Mitchell, Angelia Mitchell, Henry, and Lang were supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act.

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Kelly's is a full-service restaurant which employs cooks, servers, full-time and part-time bartenders, and security personnel (bouncers). The restaurant has two levels and there is a bar on each level. During the time material to the complaint there were approximately 7 to 10 bartenders employed at Kelly's. The employees at Kelly's are not represented by a union.

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### Helms Raises Complaints About Employee Scheduling

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Helms was hired by the Respondent as a part-time bartender in March 2014, and worked at Kelly's until she was discharged on April 30, 2015. Prior to the time that she was discharged Helms had perfect attendance record and the Respondent had never issued any written warnings or suspension to Helms.<sup>5</sup> Angelia Mitchell testified that Helms was a good bartender.

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Helms testified that Thursday, Friday, and Saturday evenings, with a 5 p.m. start time were the most lucrative shifts for bartenders at Kelly's since the major part of a bartender's wages came in the form of tips and it was during those periods that there was the most volume of business. According to Helms, she would typically be notified by an email from the restaurant manager on Saturday regarding her schedule for the upcoming week beginning on Monday.

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Helms testified that she and other employees at Kelly's had concerns about the manner in which they had some been scheduled for some period of time. In this connection, Helms testified that in October 2014, she met with Kristin Lang, along with another bartender Joe Fairley, and a server Chris Healy. According to Helms, Joe Fairley raised a complaint regarding the starting time for evening shifts. Fairley indicated that as a day-shift employee he should get all of the early start times for the evening shift and that anyone who did not work on the day shift should

<sup>5</sup> Angelia Mitchell testified that in the summer of 2014, a "spotting" company reported that Helms had given away drinks for free. Mitchell testified this was contrary to the Respondent's policy and that she instructed Supervisor Kristin Lang speak to Helms about it. Mitchell testified that Lang reported Helms did not recall the incident occurring and that no further action was taken. Helms did not testify regarding this incident and I credit Angelia Mitchell's uncontradicted testimony on this point.



not get any early evening start times. Helms stated that she worked on Sundays, which was not a lucrative shift, equal to or less than a day shift, and therefore she was also entitled to some of the early evening start times. Healy indicated that he wanted to be on the bar staff as he had been at Kelly's for some time as a server. According to Helms, Kristin Lang indicated that complaining was not going to get the employees anywhere. She said that bringing in Eugene or Angelia Mitchell was not going to get the employees earlier evening starting times. Lang stated that Eugene Mitchell "would lose his shit" if the employees brought scheduling issues up to him.<sup>6</sup>

In late November or early December 2014 Helms told Lang that she was frustrated by Lang's mismanagement of the schedule. Lang told Helms that if she complained to the Mitchells about the schedule that Lang would get into trouble and that she could not handle that stress. Lang told Helms all that what happened is that she would be told to take shifts away from Helms.

In March 2015, Michael Bevevino, Kelly's most senior bartender, gave notice to the Respondent of his intention to leave in April 2015. In early April 2015, Angelia Mitchell began to interview new bartenders to hire because Bevevino was leaving and bartender Sarah Clark had indicated that she was also leaving her employment at Kelly's because she was graduating from college and was relocating from the area.<sup>7</sup> In mid-April 2015, Angelia Mitchell hired three new bartenders including Chelsea Heyward.

According to Helm's uncontradicted and credible testimony, she spoke to Flood and Clark about their frustrations with what they viewed as an inconsistency in scheduling and talked about the effect of the newly hired bartenders on their schedules and what they could do about it. Helms, Flood, and Clark were concerned that the new employees would be assigned the prime shifts starting at 5 p.m. on Thursday, Friday, and Saturday night. The three employees were concerned that this would affect their ability to get as many hours on the prime shifts as possible before the busy season at Kelly's ended after the first week of June.<sup>8</sup> (Tr. 57-59.)

In mid-April 2015, Helms and Flood met with Ryan Henry in the manager's office in the basement of Kelly's and brought to him the concerns regarding the schedule that Helms, Flood, and Clark had discussed previously. Helms and Flood specifically noted that with the changes in the schedule that were going to occur after Bevevino left, they wanted to make sure that senior bartenders, including the two of them, would receive the prime shifts that Bevevino worked starting at 5 p.m. on Thursday, Friday, and Saturday night. Henry indicated that he was sympathetic to their complaints but that there was nothing that he could do about it. Henry stated

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<sup>6</sup> Lang, Fairley, and Healy did not testify at the hearing. As discussed above, I found Helms to be a credible witness. Accordingly, I credit her uncontradicted testimony with respect to this meeting with Kristin Lang.

<sup>7</sup> Clark's last day of employment at Kelly's was approximately May 17.

<sup>8</sup> Helms testified that the restaurant was busy through the first week of June because of graduation parties and the Villanova alumni weekend in early June, but that after that business dropped off substantially for the remainder of the summer.



that bringing these complaints to the attention of the Mitchells would result in the loss of shift hours and a loss of shifts altogether.<sup>9</sup>

At the time of the hearing, Henry was no longer employed by the Respondent and testified on behalf of the Respondent pursuant to a subpoena. Henry testified in a vague and generalized fashion regarding this meeting. Henry initially testified he recalled that he met with Helms and Flood regarding their concerns about their schedules and shifts they would be assigned in light of Bevevino leaving. He then testified, however, that he recalled Helms and another person discussing scheduling with him but he did not remember whether it was Flood. Henry indicated that while he recalled Helms expressing concern over her schedule when Bevevino left, he could not recall whether the other bartender who was present expressed a similar concern. Henry did not specifically deny the threats attributed to him regarding the loss of shift hours or shifts altogether if complaints about the scheduling were brought to the attention of the Mitchells. I credit Helms testimony regarding this meeting as it had far greater detail. In addition, I found her demeanor while testifying regarding this issue to be convincing, while Henry's demeanor reflected uncertainty as to who he met with and what was discussed

Helms testified that in mid-April, she and Healy met with Henry in the bar area on the second floor of Kelly's. Healy stated that he had met one of the new bartenders. Healy told Henry that he wanted to make sure that as he had more seniority as a bartender, that he be given more bartending shifts before shifts were given to newly hired bartenders. Henry indicated that he could not guarantee anything. Helms told Henry that there was a general feeling of frustration among the more senior bartenders and a concern that the new hires would receive the prime shifts or be put on a shift that more senior bartenders had been regularly working, causing them to be removed from the schedule. Henry replied that he worked for the Mitchells and he did what they told him to as far as when Helms had been taken off the schedule in the past and a new employee put in her spot.<sup>10</sup> Helms told Henry that she had drafted an email to Eugene Mitchell that indicated that she had earned better shifts because of consistent work and great performance and picking up terrible shifts in the past. Helms showed Henry the email that she had drafted. Henry told Helms that the email would not get her anywhere, that it was just going to anger Eugene Mitchell and he cautioned her not to send the email.<sup>11</sup> Helms testified that she did not

<sup>9</sup> I find that this meeting occurred in mid-April 2015 rather than late March 2015 as Helms testified to. Heyward, who was called as a witness by the Respondent, began working for the Respondent on approximately April 16. Heyward testified that on her first day of training she had to go to the basement at Kelly's and briefly observed Flood and Helms talking to Henry. Heyward testified that she overheard Helms and Flood tell Henry that they did not want their schedules affected by the new employees that had been hired. This portion of Heyward's testimony partially corroborates Helms testimony regarding the substance of this meeting but establishes that it occurred in mid-April rather than late March.

<sup>10</sup> Helms testified that she had previously lost shifts without an explanation when new employees were hired.

<sup>11</sup> At the time the Respondent maintained an employee handbook which included "Disciplinary Guidelines," stating, in relevant part:

Management retains the right to discipline, including dismissal from employment, for any behavior, whether related to job performance or otherwise, which adversely affects the reputation or business activities of the restaurants:

1. Criticizing, condemning, or complaining in a manner that affects employee morale. (GC Exh. 3, p.18.)



send the email to Eugene Mitchell.<sup>12</sup>

5 According to Helms uncontradicted and credited testimony, in addition to the two  
meetings, discussed above that she had with Henry and other employees to discuss employee  
concerns regarding scheduling, she spoke to Henry separately regarding the issue of scheduling  
approximately four more times from late March until the end of April 2015. In each of these  
conversations, Helms told Henry that the concern about scheduling was not hers alone, but that  
10 other bartenders were nervous and unsure of their positions and that it was causing "anxiety"  
among them. At one of her meetings with Henry, Helms told him that she wanted to speak to the  
Mitchells about the scheduling. Helms told Henry with the new employees coming in, she  
wanted to make sure that the senior employees were not going to lose prime shifts. Henry told  
her not to make any complaints to Eugene Mitchell about the schedule. Henry told her that a  
15 dishwasher who was also a cleaner recently have told Eugene Mitchell that he was not going to  
be available for several Saturdays and, as a result, Henry was told to take that employee office  
cleaning schedule in retaliation for requesting time off.

20 At the trial, Eugene Mitchell admitted that Henry told him that Helms was complaining  
about shift scheduling to other employees (Tr. 159.) According to Mitchell, this occurred in the  
spring of 2015, when the new employees were being hired. Mitchell denied, however, of being  
aware of concerns that Helms raised to management about other employees' shifts.

25 Eugene Mitchell also testified that at an unspecified time Helms told Eugene Mitchell  
that she would like longer shifts and that he had let Henry know about this. I do not credit this  
portion of Eugene Mitchell's testimony. In the first instance, Helms testified that she never spoke  
to Eugene Mitchell directly regarding her dissatisfaction with the way that shifts were scheduled  
for employees. As I have noted previously, I found Helms to be a much more credible witness  
then Eugene Mitchell and to the extent their testimony conflicts, I credit Helms. I also find that it  
30 is implausible that Helms directly spoke to Eugene Mitchell about her dissatisfaction with the  
scheduling of shifts after she had been warned by both Lang and Henry that Eugene Mitchell  
would be upset if she directly approached him regarding such complaints.

35 Angelia Mitchell also admitted that she was aware of the concerns that Helms and Flood  
had regarding what shifts they would have in view of the hiring of the three new bartenders on  
April 9 and that both employees had expressed those concerns to Henry. (Tr. 176-177.) In this  
connection, Angelia Mitchell testified that she had received an email from Henry around the time  
that the new employees were hired reflecting that Helms and Flood were concerned about their

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<sup>12</sup> Henry testified generally that he recalled that Helms raised, on at least one occurrence, concerns about the scheduling and that she wanted a particular schedule. Henry testified that he did not recall if Helms raised concerns about the schedules of other employees beyond her own. Henry testified that he had communicated with the Mitchells through email and that his interactions with them in that regard were "professional." Henry was not asked about, and therefore did not specifically deny, making the statements attributed to him by Helms regarding what he thought Eugene Mitchell's reaction would be to the email that Helms showed him. I credit Helms version of this meeting over that of Henry. Helms' testimony regarding these meetings with Henry has the type of detail that renders it reliable and her demeanor while testifying regarding this event reflected certainty.



shifts. (Tr. 260-261) Mitchell also testified that each employee complained about their individual schedule and sought improvement of their own schedule.

### The Bartenders' Practice at Kelly's Regarding Service

Helms testified that the service policy at Kelly's was that bartenders were not to serve anyone that was intoxicated or did not have identification. Helms also testified that there was an established practice that customers that were known not to tip, or not to tip well, were served after other customers. According to Helms credited testimony, this policy was enforced by Michael Bevevino, the most senior bartender, and the employee who would divide the tip money among the bartenders at the end of the evening.<sup>13</sup> Bevevino would tell other bartenders that because a customer did not tip, he or she would be served after others were served. Helms testified that when she was working in Bevevino's area and he saw her serve people that he had indicated should be served last, he would "yell" at her for serving those customers quickly. According to Helms, there were three Villanova students who were regular customers and known not to tip. Two were males and one was an African-Americans female, who was known to be in a sorority.<sup>14</sup> Helms testified that while she was sympathetic to the customers that did not tip because, for the most part they were college students who did not have a lot of money, she would comply with the practice enforced by Bevevino when he was present and serve customers known not to tip after other customers. Helms credibly testified, however, that she never refused to serve any customer unless they were intoxicated.

Helms testified that after the Super Bowl party held at Kelly's in February 2016 she had a conversation with Eugene Mitchell in which the practice regarding service to customers who do not tip, or did not tip well, came up. Mitchell asked Helms about how a couple, who were personal friends of the Mitchells and who had been at the Super Bowl party, were as guests. Helms replied that they were "nice" and that she did not have a problem the way that they tipped, but that Bevevino did not engage them and told the other bartenders to get their drinks before they left the bar area so that he would not have to do so. Helms told Mitchell that Bevevino did not interact with the couple because he felt he did not tip an appropriate amount.<sup>15</sup>

On February 15, 2015, at 1:56 a.m., a customer of Kelly's sent an email to Eugene Mitchell regarding service he received at Kelly's on the evening of February 14-15. (GC Exh. 4.) The customer's email indicated that at approximately 1:15 a.m. on February 15, a female bartender told him that he would not be served. She told him "You don't tip well enough, I work for tips, fuck you." The customer's email further indicated that "I was very upset because of the 4 drinks I previously purchased, I had tipped twice. I don't have money to tip every time, but tip every other to make sure bartenders get their pay. As I walked to another bartender, I saw the blonde woman point me specifically, and tell the other 2 bartenders not to serve me." The

<sup>13</sup> All tips were pooled and were divided equally between all bartenders on duty on a particular evening by Bevevino.

<sup>14</sup> Although Bevevino was called as a witness by the Respondent, he did not testify regarding the policy of the bartenders at Kelly's regarding the relationship between tipping and service. Thus, Helms testimony on this point is uncontradicted.

<sup>15</sup> Eugene Mitchell testified that he did not recall having such a conversation with Helms. I credit Helms testimony regarding the conversation as it had sufficient detail to establish its reliability and her demeanor while testifying regarding this incident was convincing.



customer indicated that he was concerned that he will be treated that way future visits to Kelly's which would force him to take his business elsewhere.

On February 15, at 7:41 a.m., Mitchell responded to the customer thanking him for his letter and apologizing for his experience. The email further indicated: "There are many instances with patrons who did not tip. I will tell you that regardless of the tip the bartenders are trained and instructed to treat each patron with dignity and respect. This issue noted in your email will not be lightly taken and will be addressed today."

On February 15, at 7:50 a.m., Mitchell forwarded the customer's email to the bartenders at Kelly's, and stated in his own email: "You can certainly choose to serve at your discretion but we can't have interactions like the one described below. It will do more damage than good and generally reverberate through the community. There are some really good days ahead of us with the basketball team doing well and spring around the corner . . . I think. I know these kids can be unbearable, frustrating and rude to say the least. Be patient and please do not lash out. Take a break if you need to decompress."

Later in the morning of February 15, Sarah Clark sent an email to Eugene Mitchell stating in part, "I have a much different version of the story, and I know ultimately it does not matter, but I am still sorry. I just wanted to let you know that the content in his email is not how it actually went down." Clark indicated that she would be happy to tell Mitchell her side of the story.

On the afternoon of February 15, Mitchell sent an email to Clark indicating: "Thank you for responding. I am totally on your side and everyone that works with us. The intent on sending the email was not to call you out just to let everyone know how things reverberate on the smallest of issues. You are all good with us. I would like to hear your side and that he was belligerent or cut off would be great to document. We always get hammered for VIP and never point out when folks are cut off. Anyway, don't let this impact your day, at all. Let's make some money when we have the chance. You guys deserve it."

According to Mitchell's uncontradicted and credited testimony, he later met with Clark and told her that her behavior toward the customer was inappropriate, but that no further action was taken against her. Mitchell admitted that it is quite common in the restaurant industry that some bartenders will give better service to customers who tip better. Nonetheless, Mitchell also testified that he was not aware of Bevevino's practice while employed at Kelly's of not quickly serving customers who did not tip or, in his view, did not tip appropriately. I do not credit Mitchell's testimony on this issue because, as noted above, I find that Helms specifically advised him of it. I also find that Mitchell's testimony on this issue is implausible, given his admission that he is aware that such a practice is common in the restaurant industry. In addition, the email exchange set forth above establishes that a customer complaint regarding a lack of service because of a failure to tip was specifically brought to Mitchell's attention. Mitchell acknowledges speaking to Clark about the matter and telling her that such conduct was inappropriate. The record establishes, however, that no discipline was ever administered to a bartender at Kelly's because of a failure to serve a customer, or serve a customer promptly, because the customer did not tip, or did not tip appropriately.



## Helms' Training with Heyward

Helms testified that she was assigned to train newly hired bartender Heyward on the second night of Heyward's training at Kelly's. According to Helms, she told Heyward that since  
5 Kelly's was a high-volume, quick turnover bar, typically the bartenders would first serve the customers who they knew tipped, and later serve the customers the bartenders knew did not tip. Heyward responded and that she had worked in this type of environment before and that that was the universal rule regarding service.

10 According to Helms, Heyward told Helms that Sarah Clark, who had trained Heyward on her first evening of work at Kelly's, told Heyward that shifts were not assigned well and that there were complaints from the staff regarding scheduling. Heyward added that as a single mother she needed a consistent schedule in order to support her son. Heyward asked Helms her  
15 opinion about whether she should stay at Kelly's, since Helms was also a mother. Helms replied that she agreed with Clark that shifts and scheduling were an issue but that she did give an opinion about what Heyward should do.

On cross-examination, Helms testified that while Helms was working with Heyward, the African-American woman who was in a sorority, came into the restaurant and Helms mentioned  
20 to Heyward that she was known not to tip and was served after others. Helms denied refusing to serve the customer. Heyward served the customer. Helms noted that on the same evening, Helms served several African-American bouncers who worked at the restaurant, who were with their wives and girlfriends celebrating a birthday.

25 At the time of the trial, Heyward, who is African-American, no longer worked at Kelly's and testified on behalf of the Respondent pursuant to a subpoena. According to Heyward, when they trained together, Helms told her that if newly hired employees were scheduled for earlier shifts that started at 5 p.m., Helms would be upset because she had seniority. According to Heyward, Helms complained generally about Kelly's and also told Heyward that if she was  
30 really unhappy there, Heyward should look for something else in terms of employment. Heyward responded that if it was that bad at Kelly's, she would learn that very quickly and keep moving as she had a son to care for.

Heyward testified that while she was training with Helms, two young African-American women came into Kelly's celebrating the fact that they were finishing school. Helms told  
35 Heyward that she was not going to serve them because they never tipped her. According to Heyward, Helms said that if he she wanted to wait on them she could do so but that Helms was not going to do it. According to Heyward, she waited on the two African-American women, who were there with other people. After the African-American customers had paid, Helms said to her  
40 "Let me guess, they did not tip you." Heyward responded that they did and they actually tipped well. Heyward responded that it must be because she was black also. Heyward responded that she was offended by Helms comment. Heyward also confirmed, however, that some of the African-American bouncers who worked at Kelly's came in to celebrate a birthday that evening and that Helms served them and was very nice to them.

45 I generally found that Heyward was not a credible witness. Her testimony was often disjointed and not cohesive. She at times indicated that her testimony was "my interpretation" of



events. As noted above, I found Helms to generally be credible and I credit her testimony over that of Heyward regarding the description of events that occurred when Heyward trained with Helms prior to their discussion of the tip left by the two African-American female customers. I also found parts of Heyward's testimony to be implausible. For example, Heyward testified that Helms told her that if she was really unhappy at Kelly's, Heyward should look for other employment. There is nothing in Heyward's testimony, however, to indicate that she had ever told Helms that she was unhappy at Kelly's. Under these circumstances, I find it implausible Helms would tell Heyward that if she was unhappy at Kelly's she should look for other employment.

However, I partially credit Heyward's testimony with respect to the discussion between Helms and Heyward regarding serving the African-American female customer, who was known not to tip. After carefully considering the testimony of both Helms and Heyward, I find that Helms pointed out the African-American female customer referred to earlier and told Heyward that she was known not to tip the bartenders. Heyward served that customer and another African-American female customer who was with her. I specifically find, based upon Helms consistent testimony on this point and the record as a whole, that Helms never refused to serve the African-American female customer, but merely indicated that the customer was known not to tip. However, after Heyward served the two African-American female customers, I find that Helms asked Heyward, "Let me guess, I bet they did not tip you" and when Heyward told her that she had been tipped well, Helms responded that it must be because Heyward is also black. While Heyward was not a particularly reliable witness, I do not believe that she would not invent those specific details. In addition, Helms was not questioned about what, if any, comments she made about the tip left by the African-American female customers and therefore did not specifically deny those statements.

On approximately April 28, Heyward spoke to Angelia Mitchell and told her that she had another job and was leaving. When Mitchell asked Heyward her reasons for leaving, Heyward responded by saying generally that she did not think she was treated well by Flood and Helms. Heyward also indicated that she felt "negative energy" from Helms because she did not have anything positive to say about Kelly's. Heyward also told Mitchell about the comments described above that Helms had made to her when she received a tip from the two female African-American customers. Heyward also asked Mitchell not to tell Helms what she had said about her. Heyward continued working for Kelly's for approximately 2 weeks after giving her notice.<sup>16</sup>

#### Helms' Discharge

Helms testified that on April 30, 2015,<sup>17</sup> when she reported to work to start her shift at 5 p.m., Henry asked her to come downstairs to his office. When they arrived at the office, Angelia Mitchell was also present. Shortly thereafter, Eugene Mitchell also arrived. Eugene Mitchell had

<sup>16</sup> I based these findings on the testimony of Heyward. I do not credit Angelia's Mitchell's testimony regarding the conversation between her and Heyward. Mitchell's testimony is not corroborated by Heyward in important respects and appears designed to buttress the Respondent's defense. I specifically discredit Mitchell's testimony that Heyward told her that Helms refused to serve the customer because she was black and that Helms was a racist.

<sup>17</sup> I take administrative notice of the fact that April 30, 2015, was a Thursday.



a paper in his hand and said that he had listened to hours of tape and he had heard what she had said about "us" and had documented it. Eugene Mitchell told Helms that she had hurt their feelings and that they would not take that and that she was fired. Eugene Mitchell then left the office.

Angelia Mitchell then told Helms that she was not sure if Helms knew but that when the security camera system was updated at Kelly's, listening devices were also installed and that they had recorded Helms complaints and that it had hurt their feelings. Angelia Mitchell then turned to Henry and said that she did not think that anyone knew that listening devices had been installed and Henry merely shrugged his shoulders. Angelia Mitchell then said that Eugene Mitchell wanted to "clean house" and fire the entire staff because everybody was making the complaints. Angelia Mitchell further stated that Eugene Mitchell wanted to close for the weekend and start fresh on Monday with a new staff, and that she had to talk him out of it.

According to Helms, Angelia Mitchell then stated that they had expected friends to come in that night and that she would be mortified if their friends overheard the employees talking about their complaints regarding working conditions. Mitchell stated although it is clear from the tapes that the complaints discussed between Helms and her coworkers had not been overheard by customers, she was concerned that they would be heard that night by her friends.

Helms stated that while she did complain to coworkers about working conditions she had never talked to any of the guests about it and that Mitchell would not hear anything like that of the tapes because it never happened. Helms stated that she did not understand why she was being fired because she consistently showed up for work despite having two small children. Helms also noted that she always treated customers courteously and had repeat regular customers and brought in a good amount of money. Helms stated that she was very good at her job, so why was this happening based on the valid complaints she had raised. Angelia Mitchell replied that none of that mattered to them. Angelia Mitchell stated that they were a small family business and the fact that Helms hurt their feelings meant more than actual job performance.

Helms then turned to Henry and said that her complaints about the scheduling had never been specifically addressed. Helms told Mitchell and Henry that the Respondent did not have an open door policy and when she made her complaints, she was told that they were not going to be treated in the way that she wanted them to be and that she should keep them to herself. Helms told Mitchell and the Henry that she had done a good job and worked hard and that she deserved the shifts that were not being given to her. Helms stated that there was a constant "walking on eggshells" type of atmosphere at work. Helms stated that it was frustrating not knowing whether a scheduled shift would be assigned to a newly hired employee after she had made child care arrangements. Henry admitted that Helms had complained to him about shift scheduling and that he told her that her complaints were not going to be answered in the way she wanted. At that point the meeting ended and Helms went to get her personal belongings.<sup>18</sup> While she was gathering her belongings, Flood approached her and Helms told her that she had been fired and

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<sup>18</sup> Helms consistently denied on cross-examination that her alleged refusal to serve an African-American customer was brought up in this meeting.



that Angelia Mitchell had told her that the Respondent had recorded employees and heard them complaining and that it was very likely that Flood was on the tapes also.

5 Angelia Mitchell testified that after Heyward told her she was leaving Kelly's and spoke to her about Helms, Mitchell "I set up a plan to I was going to have to get her (Helms) to admit that she did not serve a black person and to get it out of her what happened without disclosing Chelsea." (Tr.269.)<sup>19</sup> Mitchell testified that she came up with a ruse that the Respondent had listening devices at Kelly's and then Helms could not deny what happened. Angelia Mitchell testified she told Eugene Mitchell about the alleged "racist comment" made by Helms and what should be done.<sup>20</sup> Angelia Mitchell denied discussing with Eugene Mitchell Helms' complaints about scheduling in this conversation.

15 Angelia Mitchell testified that at the meeting held with Helms Eugene Mitchell asked Helms if she was unhappy and what was going on. She testified that Eugene Mitchell asked Helms if the "kids" and the late night "getting to you." Angelia Mitchell also testified that she and Eugene Mitchell told Helms that she had been "complaining to everyone except the two of them about the work environment, the late-night college students and her job." (Tr. 178.) According to Angelia Mitchell, Helms said she was miserable. Angelia Mitchell testified she then asked Helms if she denied service to a customer she felt would not tip. Mitchell testified 20 that when Helms denied it, Mitchell then told Helms that she had her on tape and asked Helms again if she denied service to someone. Mitchell testified that she could not remember if she told Helms the customer was a black person. (Tr. 272) Mitchell testified that Helms finally admitted that she had not served somebody because they did not tip. According to Mitchell's direct testimony, she told Helms, "I have a lot of people that come in here that are black. And this lady 25 happened to be black, and you said it to a black coworker." According to Mitchell, she then asked Helms what if it had been an African-American female that she coordinates functions with at the Villanova University. (Tr. 272.)<sup>21</sup> According to Angelia Mitchell, Eugene Mitchell then said that "I cannot have this, you're unhappy, we're unhappy, we cannot run a business like this. You should not be working here if you're this unhappy." According to Mitchell, Helms said, 30 "Okay" and then Eugene Mitchell left the meeting. Mitchell testified that she and her husband did not anticipate that it would end this way and that it felt like a "mutual separation." At this point, Mitchell testified she did not consider Helms an employee any longer. According to Angelia Mitchell, she then asked Helms what was going on and Helms said that she was miserable and felt like she was "walking on an eggshell every day." Mitchell further testified that 35 Helms said she was upset about all the new hires and did not like not knowing when she was going to be scheduled.

Eugene Mitchell testified in a generalized fashion that before he met with Helms on April 30, he had received complaints from her coworkers that she was difficult to work with and that

<sup>19</sup>As noted above, I specifically discredit the portion of Angelia Mitchell's testimony in which she indicated that Heyward reported to her that Helms refused to serve a black customer and that Helms was a racist.

<sup>20</sup> Angelia Mitchell's testimony does not indicate what she discussed with Eugene Mitchell regarding what they should do with Helms prior to the meeting on April 30.

<sup>21</sup> On cross-examination, however, Angelia Mitchell testified that she did not say anything to Helms about the customer being an African-American, a coworker being an African-American, or an African-American customer who the Mitchells did business with. (Tr. 351-352.)



employees did not want to work at the upstairs bar with her because she was not pleasant to be around. Eugene Mitchell also testified that he was aware that Helms raised concerns about shifts to Henry but testified that they were about her own shifts and not about other employees. Eugene Mitchell further testified to a conversation with Angelia Mitchell regarding information that she had received from Heyward regarding an African-American patron and the conversation between Heyward and Helms regarding service to that customer. Mitchell testified that he could not remember the specific statements that were relayed to him by Angelia Mitchell but that it was “definitely minority discrimination” in his mind and that they needed to address the issue with Helms. According to Mitchell, his intention was to address with Helms the specific issue that had arisen regarding service to the African-Americans patron and to also address with Helms the complaints from her coworkers that they did not want to work with her anymore.

Eugene Mitchell testified that when he arrived at Kelly’s on April 30, Angelia Mitchell, Henry, and Helms were present. When he arrived, Mitchell said to Helms that he had received complaints from her coworkers about not wanting to work with her and that she was not serving customers because she did not think that she was going to be tipped. Mitchell testified that he told Helms that there was a surveillance camera and that he and his wife had heard Helms refusing service when he and his wife listened to the audio.<sup>22</sup> Mitchell testified that he did not bring up Heyward’s name because of her request not to do so. According to Mitchell, he asked Helms what was going on. He told Helms that it seemed like she was “burned out,” and that she may be exhausted. He said that he had been doing this for 10 and 12 years and that the “kids” could wear you down and it was late the school year and it gets difficult. According to Mitchell, Helms said “You’re right. I should have left a couple weeks ago. I can’t take it anymore.” According to Mitchell he said “Okay, I guess were done here.” Mitchell testified that he assumed that the conversation was over and that “we agreed that there was no need for her to work there any longer.” Mitchell then left the meeting, while Angelia Mitchell and Henry remained with Helms. Mitchell admitted that he did not bring up the issue of Helms allegedly not serving an African-American customer at the meeting. (Tr. 292-293)

Henry testified that on April 30 he was present in his office for the meeting between the Mitchells and Helms. On direct examination, Henry testified that there were some questions about Helms’ behavior and at one point there was discussion about “discriminatory acts regarding race.” Henry then testified “At that point when she was asked about that specific piece about race, she had agreed that she had, how do I put it, done that act, I guess.” Henry testified that Helms that the reason for Helms being discharged “was directly tied to the discriminatory act.” (Tr. 381.) On cross-examination Henry testified he did not recall anything more specific about the “discriminatory incident,” but that he did recall that her termination involved a discriminatory act based on race Henry did recall, however, Eugene Mitchell telling Helms that she was fired. Henry did not recall Helms raising at the meeting that shifts were not scheduled correctly and that employees were walking on eggshells and he did not recall Eugene Mitchell leaving the meeting early.

I credit Helms testimony regarding what occurred on the meeting of April 30 to the extent it conflicts with that of the Respondent’s witnesses. Helms testimony was detailed and

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<sup>22</sup> Mitchell testified that he lied about the presence of an audio recording in order to protect the identity of Heyward.



consistent on both direct and cross-examination and was inherently plausible. Helms demeanor while testifying reflected a sincere desire to tell the truth.

5 The testimony of the Respondent's witnesses is not mutually corroborative and is replete  
with other impairments that establish it as unreliable. In the first instance, both Mitchells  
admitted that they lied to Helms about having audio recording devices at Kelly's during her  
termination meeting. The fact that the Mitchells created an elaborate fiction regarding the  
10 installation of listening devices at the restaurant is indicative of their untrustworthiness as  
witnesses. I do not accept that the Mitchells wanted to keep Heyward's name out of the  
discharge meeting as a reasonable explanation for this falsehood. Simply not divulging  
Heyward's name would suffice if that was truly a concern of the Mitchells. Eugene Mitchell  
admitted, however, that he never even brought up the issue of Helms allegedly not serving an  
15 African Americans customer while he was in the meeting. Based on inferences drawn from the  
record as a whole, I find that the Mitchells concocted a false statement regarding surreptitious  
taping equipment at Kelly's in order to have Helms believe that her protected statements to other  
employees at work regarding working conditions were secretly recorded.

20 I find Angelia Mitchell's testimony to be internally inconsistent. Angelia Mitchell  
initially testified on direct exam that she could not remember if she told Helms that the customer  
that Helms allegedly did not serve because the customer did not tip was black. Later in her direct  
testimony, Mitchell testified that she told Helms that the customer was black and that Helms told  
a black coworker that she would not serve the customer. Mitchell then added that she asked  
Helms what if the black customer had been the black woman that Mitchell worked with in  
25 coordinating parties for Villanova University. On cross examination, however, Mitchell  
completely reversed course and testified that she did not say anything to Helms about the  
customer being black, a coworker being black, or a black customer the Mitchells did business  
with. Testimony of this type containing such a fundamental internal inconsistency is not a  
reliable basis on which to make factual findings.

30 Henry's testimony was devoid of any details and conflicted in a substantial way with the  
testimony of the Mitchells. As noted above, Henry testified that Helms was discharged by  
Eugene Mitchell for a discriminatory act based on race. The Mitchells referred to the meeting  
with Helms as resulting in a "mutual separation" while Henry testified that Helms was  
discharged by Eugene Mitchell. Henry's testimony also conflicts with that of Eugene Mitchell on  
35 whether or not the issue of race came up in the meeting.

40 I find that the conflicting version of events from the Respondent's witnesses too  
unreliable on which to base factual findings. In addition, based on the record as a whole, I find it  
implausible that after weeks of trying to obtain what she believed to be an appropriate schedule  
based on her seniority, that Helms was suddenly state that she agreed with Eugene Mitchell that  
she was "burned out," and that she should have left weeks and ago and could not take it  
anymore.

45 On the basis of the foregoing, I find, based on Helms' credible testimony and admissions  
made by the Mitchells that at the meeting held on April 30, 2015, Helms was informed by  
Eugene Mitchell he had listened to recordings regarding what Helms had said about the  
Mitchells. Both he and Angelia Mitchell told Helms that she had been complaining to everyone



“except the two of them” about the work environment and her job. Eugene Mitchell said that it had hurt their feelings and they were not going to take it and she was fired.<sup>23</sup>

After Eugene Mitchell left the office, Angelia Mitchell then indicated that when the security system was updated, audio listening devices were also installed and had recorded Helms complaints and that it had hurt their feelings. Mitchell then told Helms that they were aware that the entire staff was complaining about working conditions and that Eugene Mitchell wanted to “clean house” and fire everyone because of it, but she had talked him out of it. Angelia Mitchell then said that they had expected friends to come in that night and would be mortified if their friends overheard the employees talking about their complaints regarding working conditions. Helms stated that while she did complain to coworkers about working conditions, she had never talked to any of the customers about it.

Helms stated she did not understand why she was being fired because she always showed up for work, and was very good at her job. Helms asked why this was happening to her based on making valid complaints. Angelia Mitchell replied that none of that mattered to them and that they were a small family business and the fact that Helms hurt their feelings meant more than actual job performance.

Helms then stated that she had made complaints about the scheduling of shifts and was told that they were not going to be treated in the way that she want them to be and that she should keep them to herself. Helms also reiterated her frustration regarding the scheduling of shifts, such as not knowing when you would work and having a scheduled shift allotted to a newly hired employee. Henry admitted that Helms had complained to him about scheduling and that he told her that her complaints were not going to be answered in the way that she wanted.

I also find that there was no mention made by either of the Mitchells at this meeting of Helms alleged refusal to serve an African-American customer before the meeting ended. This finding is supported by Eugene Mitchell’s admission that he did not bring up the subject at the meeting and Helms’ credible testimony. I discredit the testimony of Angelia Mitchell that the subject was raised based upon the substantial conflict between her testimony on direct examination and her testimony on cross-examination regarding this point. I also discredit the testimony of Henry that Helms was discharged because of a discriminatory act based on race because of the complete lack of detail in his testimony and the fact that it is not corroborated by any other credible evidence. I also rely on the fact that his demeanor while testifying reflected substantial uncertainty.

#### The Contentions of the Parties

The General Counsel contends that the Respondent discharged Helms on April 30, 2015, because she and other employees complained about shift schedules in violation of Section 8(a) and (1) of the Act. The General Counsel argues that that pursuant to the Board’s decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. den. 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), a prima facie case has been established that the motivation for Helms’ discharge was her protected concerted activity

<sup>23</sup> The record contains no documents reflecting the reasons for Helms’ discharge.



and the Respondent has not rebutted the prima facie case by establishing that it would have taken the same action against Helms in the absence of those activities.

The Respondent principal argument is that any complaints that Helms raised involved only her own “position and interests” and did not constitute protected concerted activity under the Act and that consequently her discharge was lawful. In support of its position the Respondent relies principally on *MCPc, Inc. v. NLRB*, 813 F.3d 475 (2016), vacating and remanding 360 NLRB No. 39 (2014).

The Respondent also contends that assuming that Helms engaged in protected concerted activity, the General Counsel has not established a prima facie case that such activity was a motivating factor for Helms’ discharge under the test set forth in *Wright Line*, supra. In this connection, the Respondent contends that many employees have contacted Angelia Mitchell regarding scheduling issues without being subject to retaliation. Finally, the Respondent contends that even if the General Counsel has established a prima facie case under *Wright Line*, it presented evidence that it would have taken the same action toward Helms in the absence of such activity. The Respondent contends that it lawfully discharged Helms because she made “racist statements and refused to serve African-American customers” and that she displayed a “negative attitude” that adversely affected other employees. (R. brief, pp. 28-29).

#### Analysis

In order to be protected under Section 7 of the Act, employee conduct must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (2014).

In *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988), the Board explained held that “to find an employee’s activity to be ‘concerted’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” Following the remand from the United States Court of Appeals for the District of Columbia Circuit, in *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), enfd. sub nom. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), the Board reaffirmed the standard regarding concerted activity that it set forth in *Meyers I* but clarified that it “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.”

It is also clearly established that concerted activity is not dependent on a shared objective by the employees involved, or on the agreement of one’s coworkers with what is proposed. In addition, an employee may act partly from self-interested motivation and still be engaged in concerted activity. *Fresh & Easy Neighborhood Market*, supra, slip op. at 4, and cases cited therein. In *Worldmark by Wyndham*, 356 NLRB 765, 766 (2011), the Board held that any doubt about whether an employee’s discussion of employment conditions with an employer is concerted is removed when other employees join in that discussion. At that point, the employee’s actions become “incontrovertibly concerted” under *Meyers* because at that point the actions are undertaken “with . . . other employees.” (268 NLRB at 497.)



In *Fresh & Easy Neighborhood Market*, supra, slip op. at 3, the Board noted that “The concept of ‘mutual aid or protection,’ focuses on the *goal* (emphasis in the original) of concerted activity; chiefly whether the employee or employees involved seek to “improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB* 437 U.S. 556, 565 (1978). In *Fresh & Easy Neighborhood Market*, the Board noted that it had found a broad range of employee activities regarding terms and conditions of employment to fall in the scope of mutual aid or protection. In this regard, the Board noted that it “has found that an employee who asked for help from coworkers in addressing an issue with management, does, indeed, act for the purpose of mutual aid or protection, even where the issue appears to concern only the soliciting employee, the soliciting employee would receive the most immediate benefit from a favorable resolution of the issue, and the soliciting employee does not make explicit the employees’ mutuality of interests.” Id. slip. op. at 5 and cases cited therein.

In *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied in relevant part on other grounds, 81 F.3d 209 (D.C. Cir. 1996), the Board held that the discussions and complaints of four employees regarding schedule changes constituted protected concerted activity and their discharge for engaging in such conduct violated Section 8(a)(1) of the Act.<sup>24</sup> In finding the employees discussions and complaints to be protected concerted activity, the Board noted that changes in work schedules are directly linked to hours and conditions of work - vital conditions of employment- and employee discussion of such issues were likely to lead to collective action.

Applying these principles to the instant case, it is clear that Helms was engaged in protected concerted activity when she discussed the schedule and shift changes with other employees and with the Respondent’s acknowledged supervisors. Helms protected concerted activity began on October 2014 when she met with then Supervisor Lang, along with bartender Fairley and server Healey to discuss problems they had with the Respondent’s schedule.

In mid-April 2015, Bevevino’s announced departure and the hiring of new bartenders spurred additional concerns about scheduling among the existing bartenders. In this connection, Helms, Flood, and Clark discussed what they viewed as inconsistent scheduling and what they could do about it. The three employees specifically discussed concerns that the new employees would be assigned the prime shifts starting at 5 p.m. on Thursday, Friday, and Saturday. The three employees discussed the effect this would have on their ability to obtain as many hours as possible on the prime shifts before the busy season at Kelly’s ended after the first week of June.

In mid-April 2015, Helms and Flood met with Henry in the manager’s office at the basement of Kelly’s and jointly presented their concerns about the scheduling of shifts. Both employees specifically noted that with the changes in the schedule that were going to occur after Bevevino left, they wanted to make sure that senior bartenders, including the two of them would receive the prime shifts starting at 5 p.m. on Thursday, Friday, and Saturday night. Also in April 2015, Helms and Healy met with Henry in the bar area on the second floor of Kelly’s and again raised issues regarding the schedule. Healy told Henry that since he had more seniority as a

<sup>24</sup> In denying enforcement of this portion of the Board’s order the court found that, assuming arguendo, the employees were engaged in a form of concerted activity, their conduct was not protected under the Act because it occurred in the presence of patients. 81 F.3d at 214.



bartender, he wanted to be given more bartending shifts before they were given to the newly hired bartenders. Helms noted a general feeling of frustration among the more senior bartenders and the concern that the new hires would receive the prime shifts, or be put on the shift that more senior bartenders had been working, causing them to be removed from the schedule.

In addition to the meetings that she had with other employees and Henry, Helms had approximately four other discussions with Henry about the scheduling of bartenders. In each of these conversations, she told Henry that concerns about scheduling was not hers alone but that other bartenders were unsure of their positions and it was causing anxiety among them.

It is clear that Helms discussions with Flood and Clark regarding scheduling is concerted protected activity pursuant to the Board's decision in *Aroostook*, supra. The meetings that Helms had with Lang and Henry at which other employees were present and concerns were raised by the employees regarding the scheduling of shifts constituted "incontrovertibly concerted" activity pursuant to the principles expressed in *Meyers I* and *Worldmark by Wyndham*.

The fact that at the meetings that Helms, Fairley, and Healy held with Lang in October 2014, 2014, and the meeting that Helms and Healy had with Ryan in mid-April 2015 the employees raised individual issues regarding scheduling does not detract from the fact that, on a collective basis, they were raising concerns about working condition and thus were engaged in protected concerted activity. *Fresh & Easy Neighborhood Market*, supra slip op. at 4.

I do not agree with the Respondent's position that the decision of the United States Court of Appeals for the Third Circuit in *MCPc, Inc.*, supra, requires a finding that Helms was not engaged in protected concerted activity. In *MPCc, Inc.*, 360 NLRB No. 39 (2014), the Board found that the respondent violated Section 8(a)(1) of the Act by discharging an employee for engaging in protected concerted activity. In that case during a group meeting conducted by a respondent supervisor, the participants discussed the employees' heavy workload and one employee, Galanter, urged the respondent to hire additional engineers to alleviate the work load. In support of this point, the Galanter mentioned that the respondent had hired a corporate executive at a \$400,000 salary that could have been used to hire additional engineers. Two other employees present at the meeting expressed agreement with Galanter. The Board found that Galanter engaged in protected concerted activity when discussing with other employees terms a condition of employment, pursuant to the principles set forth in *Meyers II* and *Worldmark of Wyndham*. In doing so, the Board noted that it had consistently found activity concerted when a single employee protests changes to employment terms common to all employees in front of the coworkers. The Board also noted that the discussion about employee workload's occurred at a meeting involving team building and that two other employees participated in the discussion by expressing agreement with the latter's comments. *Id.* at slip op. 1.

In its decision, the Third Circuit, after considering its own relevant precedent, including *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), and that of the Board, concluded, in agreement with the Board, that Galanter had engaged in concerted protected activity. (813 F.3d 482-487.) However, the court vacated the Board's decision and remanded it to the Board for further consideration of the Respondent's defenses under *Wright Line*.



I am, of course, obligated to apply Board precedent in deciding the allegations of the complaint, *Pathmark Stores, Inc.* 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.* 273 NLRB 746, 749 fn. 14 (1984). Thus, I must apply the rationale of the Board's decision in MPCc in resolving the issues presented by the instant case. Since in its decision in MPCc, the Third Circuit agreed with the Board's analysis of whether Galanter engaged in protected concerted activity, I do not find that the court's decision in any way supports the Respondent's contention in the instant case that Helms did not engage in concerted protected activity. Accordingly, on the basis of all of the foregoing, I find that Helms was engaged in protected concerted activity when she presented employee concerns to the Respondent's supervisors regarding the scheduling of bartenders' shifts.

The Board applies the analysis of *Wright Line*, supra, to 8(a)(1) allegations that turn on motive. *Ferguson Enterprises*, supra, at 1121 fn. 3; *State Plaza Hotel*, 347 NLRB 755 (2006). In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity, and antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. Accord: *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011).

In the instant case, as discussed in detail above, Helms clearly engaged in protected concerted activity when she raised complaints about scheduling with, and on behalf of, other employees to admitted Supervisors Lang and Henry.

With regard to whether the Respondent had knowledge of the protected concerted complaints made by Helms regarding the scheduling of the employees at Kelly's, Helms credited testimony establishes that, along with other employees, she presented scheduling complaints to both Lang and Henry. Board law is clear that a supervisor's knowledge of protected activity is imputed to the Respondent, absent credible evidence to the contrary. *State Plaza Hotel*, supra, at 755-757 (2006); *Dobbs International Services*, 335 NLRB 972, 972-973 (2001). As noted above, Lang did not testify in this matter. Henry's testimony regarding his meetings with Helms in which she presented scheduling complaints was vague and I do not credit it. In this regard, Henry testified that he recalled on at least one occurrence Helms raised concerns about her scheduling and wanted a particular schedule but he did not recall she raised concerns about the schedules of other employees. Accordingly, there is no credible evidence that Lang and Henry did not convey that Helms' complaints about scheduling were raised with, and on behalf of, other employees.

As noted above, Eugene Mitchell admitted that around the time that the new bartenders were hired in mid April 2015, he was informed by Henry that Helms was complaining about shift scheduling to other employees and that she had complained about shift scheduling to him. Eugene Mitchell denied, however, being aware of concerns that Helms raised to management



about other employees' shifts. Angelia Mitchell admitted that she was aware of the concerns that Helms and Flood had regarding the shifts they would be assigned because of the hiring of the new bartenders in mid-April 2015 and that both employees had expressed those concerns to Henry. Angelia Mitchell also admitted that she received an email from Henry at this time reflecting that Helms and Flood were concerned about their shifts. Angelia Mitchell also denied that she was aware that the concerns were anything more than each employee's complaint about their individual schedule.

I find that the Mitchells had knowledge of the protected concerted nature of Helms complaints about the scheduling of bartenders at Kelly's before she was discharged. Based on the admissions discussed above alone, I believe that there is sufficient evidence to establish the Mitchells knowledge of the concerted nature of Helms' complaints about the scheduling of shifts at Kelly's. The Board's decisions in *Meyers I*, supra, and *Worldmark by Wyndham*, establish that an employee's actions are concerted when they are undertaken with other employees. In the instant case both Mitchells admitted that they were aware that Helms undertook her activities regarding complaints about the schedule with other employees. In addition, I specifically do not credit the denials of both Mitchells that they were unaware of the concerted nature of Helms' complaints regarding the scheduling of bartenders at Kelly's as I find it implausible when I consider it in conjunction with the other evidence discussed above on this issue. In reaching this conclusion, I specifically note that the credited testimony of Helms establishes that at the April 30 meeting with Helms, Angelia Mitchell stated that she and her husband were aware that the entire staff was complaining about working conditions and that they would be mortified if their friends overheard the employees talking about their complaints regarding working conditions.

There is evidence to establish that the Respondent harbored animus regarding protected concerted complaints regarding working conditions at Kelly's. In this regard, Lang told Helms and two other employees in October 2014, when they complained to her as a group about scheduling issues, that complaining about scheduling was not going to get the employees anywhere and that Eugene Mitchell, "would lose his shit" if employees brought scheduling issues to him. In December 2014 Lang told Helms that if she complained to the Mitchells about the schedule, Lang would be told to take shifts away from Helms. In mid-April 2015, Henry told Helms and Flood that bringing their complaints regarding the scheduling of bartenders to the attention of the Mitchells would result in the loss of shift hours and a loss of shifts altogether. Also in mid-April, in a meeting that Henry had with Helms and Healy, Henry told Helms that sending an email to Eugene Mitchell indicating that she had earned better shifts because of her good work would not get her anywhere and was just going to anger Eugene Mitchell. Finally, at the April 30 meeting at which Helms was discharged, Angelia Mitchell told Helms that Eugene Mitchell wanted to "clean house" and fire all of the employees because of their complaints about working conditions but she had talked him out of it.

In addition to the explicit evidence regarding animus toward concerted employee complaints regarding working conditions, I note that the Respondent's handbook displays an antipathy to employee complaints about working conditions. The handbook states that an employee can be disciplined, up to and including discharge, for conduct "which adversely affects the reputation or business activities, of the restaurant. The handbook specifically lists as an example of such conduct "Criticizing, condemning, or complaining in a manner that affects employee morale."



I also draw the inference that Helms' discharge was discriminatorily motivated based on the timing of Helms precipitous discharge shortly after her series of protected concerted complaints to Henry regarding the scheduling of employees. The Board has clearly held that circumstantial evidence, such as the timing of an adverse action, supports an inference of unlawful motivation. *Mesker Door Inc.*, 357 NLRB 591, 592 (2011); *Sears, Roebuck & Co.*, 337 NLRB 443, 445 (2002).

The Respondent contends, however, that many other employees have contacted Angelia Mitchell and Eugene Mitchell about scheduling and have not been disciplined or retaliated against for doing so. In this regard, the Respondent introduced into evidence a substantial number of the emails (R. Exh. 3) from employees for the period from May 1, 2014 through the end of May 2015, that were primarily sent to Angelia Mitchell. A few were sent to Eugene Mitchell. These communications involve, for the most part, routine requests for days off, and the responses from the Mitchells. There is one email dated October 22, 2014, from Eugene Mitchell to "Kris Ale House" that involves a scheduling issue but this email involves scheduling at the "Ale house" and makes no reference to Kelly's. (R. Exh. 3. p. 61).

The Respondent also introduced into evidence a number of text messages that were sent to Angelia Mitchell's phone and her replies to those messages for the period from May 20, 2015, to March 20, 2016. (R. Exh. 4.) These messages involved matters involving the everyday operations at Kelly's. To the extent that they involve scheduling, the messages from employees reflect routine notifications such as being late work or covering the shift of another employee.

None of the emails or text messages introduced by the Respondent involved concerted protected complaints by employees regarding perceived problems regarding the manner in which the Respondent scheduled employees at Kelly's. I find that the Respondent's evidence establishing that employees sent emails and text messages to the Mitchells regarding routine matters at Kelly's is insufficient to rebut the evidence discussed above establishing the Respondent's animus toward the lodging of protected concerted complaints about scheduling.

Based on the foregoing, I find that the General Counsel has met his initial burden of persuasion and established a prima facie case of discriminatory motivation as required under *Wright Line*. I now consider whether the Respondent has met its burden to establish that it would have taken the same action against Helms, in the absence of her protected concerted activity.

In its brief the Respondent asserted that it had a lawful basis on which to discharge Helms because she made racist statements and refused to serve an African-American patron. As I have found above, there is no credible evidence that the Respondent questioned Helms about her conduct regarding that incident or that it notified her that such conduct was the basis for her discharge on April 30, 2015. In fact, Eugene Mitchell admitted that he never raised the issue of race at this meeting, let alone told Helms that this was the basis for discharge.

Under all circumstances present in this case, I find that the Respondent's reliance on Helms alleged racist comment and refusal to serve an African American customer is pretextual. As noted above, the credited testimony establishes that Helms merely pointed out a customer and informed Hayward that the customer, who was an African-American female, was known not to



tip. Helms did not indicate that she would not serve the customer. After Heyward served that customer and her companion, another African-American female, Helms asked Heyward if she had received a tip and when Heyward indicated that she did and that it was a good one, Helms replied that it must be because Heyward is also black.

5 Rather than investigate the circumstances of this incident regarding the service to the African-American customer and comments made by Helms to Heyward about the tip that he would receive, the credited evidence establishes that the Respondent abruptly terminated Helms and never raised this incident with Helms when she was terminated. As further support for my  
10 conclusion that this asserted reason for Helms discharge is pretextual. I note the record clearly establishes that the practice of not serving a customer quickly because the customer was known not to tip was well known to the Mitchells. In addition, the manner in which, Eugene Mitchell addressed the customer complaint that bartender Sarah Clark refused to serve the customer because he failed to tip, establishes that the Respondents normal approach to such a situation is  
15 to give the employee involved an opportunity to give an explanation regarding the circumstances of such an incident.

The Respondent also argues that it lawfully discharged Helms because she displayed a  
20 "negative attitude" that adversely affected other employees. I also find that the Respondent's reliance on this asserted reason for Helms discharge is pretextual. There is again no credible evidence that the Respondent ever advised Helms of any complaints that other employees had made about working with her prior to her discharge in order to give her an opportunity to address such complaints.. There is also no credible evidence that she was advised that a complaint by  
25 coworkers about her was a reason for her discharge on April 30.

The Board has held that the failure to tell an employee the asserted reason for an adverse employment action is a factor to be considered in determining whether an employer has established a valid defense under *Wright Line*. *D & F Industries*, 339 NLRB 618, 622 (2003). The Board has also found that an employer's failure to conduct a fair and full investigation and  
30 give an employee the opportunity to explain his or her actions before imposing discipline is a significant factor in finding discriminatory motivation. *Publishers Printing Co.*, 317 NLRB 933, 938 (1995), *enfd.* 106 F.3d 41 (6<sup>th</sup> Cir. 1996).

In the instant case, the evidence convinces me that the incident involving the service to  
35 the African-American female customer and the comments made by Helms to Heyward regarding why Helms believed that Heyward received a tip played no role in the decision to discharge Helms. Rather, it is a pretext designed to mask the Respondent's discriminatory motive. I further find that the Respondent's claim that it lawfully discharged Helms because she displayed a negative attitude that adversely affected other employees is also pretextual. On the basis of the  
40 foregoing, I find that the Respondent has not met its burden to establish under *Wright Line* that it would have discharged Helms if she had not engaged in protected concerted activity. Accordingly, I find that the Respondent discharged Helms because of her protected concerted activities in violation of Section 8(a)(1) of the Act.

#### 45 CONCLUSIONS OF LAW

1. By discharging Robin Helms on April 30, 2015, the Respondent has engaged in unfair



labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Robin Helms, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, the Respondent must compensate Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>25</sup>

### ORDER

The Respondent, Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom, Bryn Mawr, Pennsylvania, its officers, agents, successors, and assigns, shall

#### 1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activity in order to discourage employees from exercising their rights under the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

#### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer employee Robin Helms full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

<sup>25</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.



(b) Make Robin Helms whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Compensate Robin Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Robin Helms in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Bryn Mawr, Pennsylvania, copies of the attached notice marked "Appendix."<sup>26</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 30, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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<sup>26</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD-50-16

Dated, Washington, D.C., June 13, 2016.

*Mark Carissimi*

---

Mark Carissimi  
Administrative Law Judge



## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in activities on behalf of, or in support of, your fellow employees regarding wages, hours, and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Robin Helms full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Robin Helms whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Robin Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Robin Helms, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

MID-ATLANTIC RESTAURANT GROUP LLC  
d/b/a KELLY'S TAPROOM  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website:

**[www.nlr.gov](http://www.nlr.gov).**  
**615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404**  
**(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.**

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/04-CA-162385](http://www.nlr.gov/case/04-CA-162385) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF  
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER  
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS  
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE.



**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MID-ATLANTIC RESTAURANT GROUP LLC d/b/a  
KELLY'S TAPROOM

and

ROBIN C. HELMS

Case 04-CA-162385

**ORDER TRANSFERRING PROCEEDING TO  
THE NATIONAL LABOR RELATIONS BOARD**

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

**IT IS ORDERED**, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., June 13, 2016.

By direction of the Board:

Gary Shinnars

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Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1015 Half Street SE, Washington, DC 20570, on or before **July 11, 2016**.

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MID-ATLANTIC RESTAURANT GROUP  
LLC d/b/a KELLY'S TAP ROOM

and

Case 04-CA-162385

ROBIN C. HELMS, an Individual

**MID-ATLANTIC RESTAURANT GROUP LLC DBA KELLY'S TAP ROOM'S  
EXCEPTIONS**

Respondent Mid-Atlantic Restaurant Group hereby files the following exceptions to the Decision and Recommended Order of ALJ Mark Carissimi for reasons explained more fully in its supporting Brief:

1. Respondent excepts from the ALJ rendering a decision despite General Counsel's tactics, inconsistent and impermissible under basic rules of fairness, as explained in Respondent's Brief. Respondent cannot except from a specific section of the Decision since the ALJ fails to mention the issue except to acknowledge his own ruling, which will be discussed later, in footnote 3. Respondent's Brief -Argument Section A.

2. Respondent excepts from the ALJ considering any evidence from Ms. Helms relating to time periods outside those mentioned in the Complaint for the reasons stated in Respondent's Brief. Respondent's Brief -Argument Section A. Specifically, the portions of the ALJ's decision as follows:

- a. ALJ Decision n.3 – Acknowledging the ALJ's ruling and subsequently failing to follow it.
- b. ALJ Decision - 3:37-4:13 – Relating to matters outside the scope of the complaint that should have been considered.



- c. ALJ Decision – 7:6-8:47 – This entire section was outside the scope of the complaint and should not have been considered.
- d. ALJ Decision – 17:23-18:21 – This section considers several events outside the scope of the complaint.
- e. ALJ Decision – 19:27-43- It was improper to consider anything relating to Kristen Lang who was a supervisor outside the scope of the Complaint.

#### FINDINGS OF FACT AND CREDIBILITY

3. For the reasons stated in Respondent's Brief the testimony of Robin Helms should not have been credited. Respondent's Brief -Argument Section B. Respondent excepts from the following determinations:

- a. ALJ Decision 2:26-39- The ALJ finds Robin Helms credible and fails to address the significant inconsistencies, is uncorroborated, and her significant motivation to lie. This was incorrect for the reasons stated in Respondent's Brief.
- b. ALJ Decision 2:40-3:2 – The ALJ fails to credit the corroborated and supported testimony of Eugene and Angie Mitchell. As described in Respondent's Brief this was clear error.
- c. ALJ Decision – 3:25-4:20 – These findings are excepted from to the extent Robin Helms was found credible, which as Respondent showed, she was not.
- d. ALJ Decision – 4:22-5:3- This testimony of Robin Helms should not have been credited for failure to support with other witnesses and failure to be corroborated by Ryan Henry and being against all other evidence about approaching the Mitchells.

- e. ALJ Decision – 5:4-16 – The ALJ should not have failed to credit Ryan Henry in this regard as he testified consistently that the Mitchells were approachable and the ALJ should have recognized that this does not support Robin Helms story that she was told not to bring complaints to upper management.
- f. ALJ Decision – n 9 – This finding is wholly without merit for the reasons stated in Respondent’s Brief.
- g. ALJ Decision 5:18-6:16, n. 12 – ALJ should not have credited this testimony as it was unsupported by anyone, including Ryan Henry.
- h. ALJ Decision 6:23-31 – The ALJ’s credibility determinations are against the evidence and irrational as explained in Respondent’s brief.
- i. ALJ Decision n.15 – There was no reason to credit Helms over Mitchell as Helms should not have been found credible for reasons stated in Respondent’s Brief.
- j. ALJ Decision 9:1-10:35- Ms. Helms should not have been found credible over Heyward, an independent witness, and Angie Mitchell for the reasons explained in Respondent’s Brief.
- k. ALJ Decision 10:39-15:36 – Respondent excepts from this entire section to the extent it find Robin Helms wholly unsupported version of events over all other witnesses and evidence. This was improper for the reasons stated in Respondent’s Brief.
- l. ALJ Decision 17:23-18:21- Improperly finding “concerted activity” based on Robin Helms’ entirely unsupported and contradicted version of events.
- m. ALJ Decision 19:32-43 – Improperly failing to credit Ryan Henry’s testimony, an independent witness, over Robin Helms who has a large financial motivation.



- n. ALJ Decision 19:44-20:23 - Improperly crediting Robin Helms' testimony over Gene and Angie without any justification.
  - o. ALJ Decision 20:25-39- Improperly crediting testimony regarding animus when the testimony Helms regarding the Mitchells' approachability is **entirely** unsupported as explained in Respondent's Brief.
  - p. Although not noted specifically, to the extent the ALJ impermissibly shifted the burden, as discussed in Respondent's Brief.
4. Respondent cannot except specifically regarding these issues as they are unmentioned by the ALJ despite being in the record. Respondent excepts from the ALJ's failure to consider the following items for reasons explained Respondents' Brief -Argument Section B:
- a. The ALJ's complete failure to account for Robin Helms failure to call **any** corroborating witnesses despite them being available.
  - b. The ALJ failed to take into account the significance of the mountains of independent evidence regarding the Mitchells and Kelly's Tap Room conclusively demonstrating that Robin Helms' testimony is not worthy of any belief.
  - c. The ALJ failing to account for the fact that everyone tells the same story about the separation meeting, save Robin Helms, including independent witness Ryan Henry further and significantly erodes Robin Helms' credibility.
  - d. The ALJ's failure to account for Robin Helms' preposterous story that Angie Mitchell said that Respondent is "a small family business and my hurting their feelings mattered more than my actual job performance" and the effect on her credibility.

FINDING OF "CONCERTED ACTIVITY"

5. Respondent excepts from the ALJ's finding of concerted activity as entirely unsupported by law or the record as explained Respondent's Brief. ALJ Decision at 16:23-19:10. Respondent's Brief -Argument Section C.

6. Respondent excepts from the ALJ's decision finding the MCPc, the controlling law in the Third Circuit, inapplicable here for the reasons stated in Respondent's Brief. ALJ Decision at 18:23-19:10. Respondent's Brief -Argument Section C.

7. Respondent excepts, as stated above, from any consideration of items outside the scope of the Complaint regarding concerted activity. 17:23-18:21. Respondent's Brief -Argument Section C.

8. Respondent excepts from the finding of concerted activity despite the issues of getting the best shifts is necessarily self-interested conduct and despite all evidence showing Ms. Helms and any others were out for themselves. ALJ Decision at 16:23-19:10. Respondent's Brief -Argument Section C.

9. Respondent excepts from the ALJ failing to require evidence of a single other person joining, other than Helms' unreliable testimony, or to require evidence that anyone was actually negatively affected by scheduling, including Robin Helms. ALJ Decision at 16:23-19:10. Respondent's Brief -Argument Section C.

#### FINDINGS REGARDING TERMINATION

10. Respondent excepts from the ALJ's finding of animus based on Respondent's Handbook for the reasons stated in Respondents' Brief. ALJ Decision 20:41-47. Respondent's Brief -Argument Section D.



11. Respondent excepts from the finding of the ALJ regarding the timing of Ms. Helms' discharge as timing actually supports Respondent as explained in Respondent's Brief. ALJ Decision 21:3-7. Respondent's Brief -Argument Section D.

12. Respondent excepts from the findings of ALJ failing to credit the overwhelming evidence that Robin Helms story about being discouraged from raising complaints is ridiculous and unsupported. ALJ Decision 21:9-30. Respondent's Brief -Argument Section D.

13. Respondent excepts from the ALJ's finding that General Counsel met his initial burden under *Wright Line* for the reasons stated in Respondent's Brief. ALJ Decision 21:32-35. Respondent's Brief -Argument Section D.

14. Respondent excepts from the ALJ's finding of Respondent's reasons for Robin Helms' discharge to be pretextual for the reasons explained in Respondent's Brief. ALJ Decision 21:44-22:39. Respondent's Brief -Argument Section D.

15. Respondent excepts from the ALJ's finding of a violation of Section 8(a)(1) for the reasons stated in Respondent's Brief. ALJ Decision 22:40-44. Respondent's Brief -Argument Section D.

16. Respondent excepts from the ALJ's conclusions of law and proposed remedy as being unsupported by facts or law. ALJ Decision 22:45-23:24. Respondent's Brief -Argument Section D.

17. The ALJ fails to take into account the extremely significant evidence that there were no adverse actions against any of the persons Robin Helms claims joined her complaints. ALJ Decision 21:44-22:39. Respondent's Brief -Argument Section D.

#### REMEDY

18. Respondent excepts from the entire recommended remedy of the ALJ because as demonstrated in Respondent's Brief, there has been no violation of the Act and no remedy is warranted. ALJ Decision 23:5-24:38. Respondent's Brief -Argument Section.

CONWAY SCHADLER

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MID-ATLANTIC RESTAURANT GROUP  
LLC d/b/a KELLY'S TAP ROOM

and

Case 04-CA-162385

ROBIN C. HELMS, an Individual

**MID-ATLANTIC RESTAURANT GROUP LLC DBA KELLY'S TAP ROOM'S BRIEF  
IN SUPPORT OF ITS EXCEPTIONS**

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**QUESTIONS PRESENTED**

1. Whether the tactics of General Counsel, which were permitted and furthered by the ALJ, rendered the process prejudicial and unfair to Respondent? Exceptions 1, 2a.-e., 18.
2. Whether the findings of the ALJ crediting the uncorroborated, inconsistent, and contradicted testimony of Robin Helms was steadfastly against the substantial weight of the evidence? Exceptions 3a.-p., 4a.-d, 18.
3. Whether ALJ's finding of concerted activity in this matter was error given the facts at issue? Exceptions 5-9, 18.
4. Whether the ALJ's finding that General Counsel had met its burden under *Wright Line* and that Respondent had not proven that it would have taken the same action regardless were in error? Exceptions 10-18



### **STATEMENT OF THE CASE**

Respondent<sup>1</sup> presented multiple, independent witnesses, reams of evidence and scores of facts that proved Robin Helms was out for one person, Robin Helms, and that her firing was not a part of her self-serving, unsupported testimony, but as a result of an incident of blatant racism. The Court, in straining to find for Robin, disregarded every piece of evidence and scores of witnesses, taking the approach that “anyone or anything contradicted Robin must be a lie” in an effort to support its wholly flawed ruling. Furthermore, the ALJ made specific and clear rulings on the record that, in the ALJ’s effort to support Robin, the ALJ shockingly and impermissibly ignored in its decision. Despite the effort to find for Ms. Helms, the decision fails to articulate, as did General Counsel, any concerted activity by Ms. Helms; the difficulty to find concerted activity is understandable, as even the most generous reading of the record shows that there was none.

This is compounded by the tactics of General Counsel, which included deceptive and dishonest statements to the Court, along with purposely withholding information. These tactics were highly questionable at best, as enumerated below. In addition, upon review, the conclusions of the ALJ are entirely inconsistent with what was presented, which acts to demonstrate the lengths to which the ALJ went in order to find for Robin Helms. Justice and the integrity of the NLRB demand the decision be overturned.<sup>2</sup>

#### **A. The Government’s Tactics and ALJ’s Continuation**

The Complaint in this matter consisted of six paragraphs that gives next to no information about the claims at issue. The only claim made regarding protected activity that remained after amendment at the hearing was that “[i]n March and April of 2015, Respondent’s employees,

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<sup>1</sup> Respondent will refer to Respondent as either “Respondent,” “Mid-Atlantic” or “Kelly’s.”

<sup>2</sup> The Respondent will reference the Decision of the ALJ in this matter simply as the “Decision.”

including Robin Helms openly complained about shift schedules.” Complaint at 4(a); (Tr. at 11:16-12:4). There is not a single other employee specifically mentioned therein. The Complaint lists only three individuals, Gene and Angelia Mitchell and Ryan Henry as supervisors and managers within the meaning of Sections 2(11) and 2(13), respectively, within the act. The Government went to great lengths, as discussed in length below, to actively conceal the identity of relevant and key witnesses as, in their case-in-chief, they sought to add (without amending the Complaint), Kristen Lang as a supervisor within the meaning of the act and discussed several other employees that were never previously disclosed. Respondent filed an answer denying the claim that Ms. Helms engaged in protected activity and denying that she was discharged due to any protected activity. See Respondent’s Answer and Affirmative Defenses.

Respondent also filed a motion for a bill of particulars due to the extremely bare bones nature of the Complaint. This motion was denied. Respondent, Counsel for Ms. Helms and the ALJ<sup>3</sup> engaged in a series of calls leading up to trial. In those calls the Court directly and repeatedly asked Counsel for Ms. Helms about amendments or additions to the Complaint, Counsel replied that there would be no substantive changes and that General Counsel would only be taking from, not adding to, the Complaint. The aforementioned statements were completely dishonest. General Counsel’s Complaint protected Helms’ testimony so as to not divulge the full nature of her claims, and then, at Trial, sprung new persons, new dates, and new “facts” on Respondent, the thing that Respondent feared from the beginning. Respondent noted for the record that this was emblematic of the tactics in this matter.

As stated, Respondent requested more information by filing a motion for a bill of particulars as well as repeatedly requested, as did the ALJ, this information during phone

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<sup>3</sup> The matter was, initially, assigned to a different ALJ, The Honorable Susan Flynn. The phone calls leading up to the hearing took place with, and under the direction of, Judge Flynn.



conferences. Then at Trial, General Counsel, *in their case in chief*,<sup>4</sup> was blind siding Respondent with testimony about new individuals who allegedly joined Ms. Helms' "complaints", new individuals sought to be presented as supervisors and agents under the Act, as well as expanding the time frame of the Complaint from two to eight months (quadrupling it). (Tr. at 35:19-25) ("[N]ow we have essentially started the hearing and we are essentially jackpotted with this information when it's clearly supposed to be stated in the complaint...[s]o we would object to any kind of identification of this individual as fitting within the Act because the statements will come to be attributed to our clients, which runs afoul completely to the rules of procedure.").

Respondent noted for the record that the introduction of undisclosed persons to be considered as supervisors or agents was completely improper. (Tr. at 46:5-49:14) ("This is an individual not named in the complaint and also for a time frame not contained in the complaint. The prejudice is enormous and our issue isn't so much with agreeing with the government's contention that she is a manager, I'll stipulate that she is. It is what flows from that and the severe prejudice my client has."). The Court in addressing General Counsel with regard to Ms. Lang, the previously unnamed supervisor, stated "there are no unfair labor practices attributed to Ms. Lang [but] you're going to contend in your brief that she is in fact a supervisor and any statements she makes, if I were to credit Ms. Helms' testimony, are admissions against inference against the Respondent. Am I correct, sir?" (Tr. at 51:1-11). General Counsel acknowledged this was the case and the Court stated "[s]o that is the case...[a]nd so consequently it would have been better in my view if the Respondent had been notified that that is someone who you are

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<sup>4</sup> It is important to note that General Counsel sought to introduce these new date and supervisor almost immediately in their case-in-chief, not as a part of a rebuttal case. Such tactics demonstrate that the withholding of this witness was not a heat of the moment trial decision made in response to an assertion or witness by Respondent, but rather calculated legerdemain by General Counsel.

claiming to be a supervisor and agent, and they could have prepared more adequately prior to the hearing.” (Tr. at 51:11-16). The Court made crystal clear that anything that was not mentioned in the Complaint would be found by the Court to be an unfair labor practice. (Tr. at 52:25-53:5). Respondent relied on this clear ruling only to receive a shocking surprise when reading the ALJ’s findings: a large basis of the ruling for the finding of concerted activity, one of the key issues in the case, was based upon the very conduct and facts the ALJ said he would not consider. The ALJ made no statement or, at the least, gave no indication that he was reversing or abandoning his clear evidentiary ruling and, sadly, Respondent was significantly prejudiced by relying on the ALJ. This action was inconsistent with the notions of fair play and justice and, as such, wholly improper.

**B. Robin Helms’ Testimony**

Robin Helms was hired by Mid-Atlantic in March of 2014. (Tr. at 16:10-11). Ms. Helms admits that she desired to work Thursday, Friday, and Saturday and that those were the “lucrative shifts.” (Tr. at 17:15-18:5). Ms. Helms claimed she was “frustrated” over the scheduling of hours and alleged “inconsistency, lack of knowledge of when I would be working in the next couple of days.” (Tr. at 19:21-23; 20:20-26). Her frustration started at “the very end of my stay with Kelly’s, very much late March, April” and that prior to that “I was generally happy with it.” (Tr. at 21:1-9). Notably, she did not say her schedule was actually affected during this time.

Ms. Helms then discussed her co-worker named Kris Flood and offered unsupported hearsay testimony about Ms. Flood’s statements that her schedules were shifted for complaining. (Tr. at 24:6-11). General Counsel made no effort to call Ms. Flood as a witness and subsequent testimony established that Ms. Flood still works for Mid-Atlantic and has received a promotion.



(Tr. at 261:10-15). Ms. Helms then alleged that she approached Ryan Henry with her concerns about scheduling in April 2015 and she was allegedly told not to bring those concerns to Gene and Angie Mitchell, the owner and manager of Kelly's. (Tr. at 24:20-25:24). As noted below, this is entirely inconsistent with the testimony of all other witnesses, as well as the physical evidence.

Ms. Helms then contradicts her prior testimony that she was generally happy with scheduling prior to March/April of 2015 and states that a previous manager named Kristen Lang, which again there was no attempt to call as a witness<sup>5</sup>, also stated that contacting Gene and Angie Mitchell was discouraged. (Tr. at 26:14-24). Ms. Helms then testified about her and Ms. Flood allegedly complaining to Ryan Henry about scheduling in light of new hires in March of 2015. (Tr. at 54:18-56:2).

Ms. Helms stated that she, Kris Flood, and Sarah Clark (who left Kelly's voluntarily upon graduating from Villanova and moving to New York) "were concerned that these new employees would be given the prime shifts as the busy season approached which was our time for really squeezing in as many hours, as many shifts as possible so we could make money before this season recessed." (Tr. at 57:5-25). Ms. Helms stated in regard to a conversation with Mr. Henry: "I again noted my concerns to him...[t]hat as these new hires would receive the prime spots or again be put on a shift that we had typically worked and then we'd be removed from them all together." (Tr. at 60:4-11). She again claims that she was told not to contact Gene and Angie Mitchell by Ryan Henry. (Tr. at 60:16-61:4).

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<sup>5</sup> It is, again, important to note the length that General Counsel went to hide the identity of Ms. Lang. Ms. Lang was not named in the Complaint and the dates of testimony regarding Ms. Lang's action fell outside the dates of the Complaint. There is, quite literally, absolutely nothing in the Complaint that could be read to put *anyone* on notice that Ms. Lang and the testimony regarding her actions would be a part of the trial.

Ms. Helms stated she was fired in a meeting in which she was told by her employer that her complaining was the problem and it had “hurt their feelings.” (Tr. 64:1-65:16). Ms. Helms testimony is, as shown below, in direct contrast the testimony of everyone else who was in that meeting. Ms. Helms then claims that upon defending her job performance, Ms. Mitchell “said that none of that mattered to them...[t]hat they are a small family business and my hurting their feelings mattered more than my actual job performance.” (Tr. at 68:8-16).

On cross examination, Ms. Helms admitted that there were only about “four to six” times that she experienced what she called scheduling issues. (Tr. 96:21-98:13). Ms. Helms stated that her concerns were that she had “done a lot of favors” and she “wanted to make sure that that had earned me the better, more lucrative shifts.” (Tr. at 98:16-24). Ms. Helms testifies about the alleged disfavored treatment of customers that do not tip as “it’s pretty universal” despite previously suggesting that this policy was enforced by Mike Bevevino. (Tr. at 99:7-8; 73:17-74:3). Ms. Helms admits that this “tipping policy” was verbal and Ms. Helms had no evidence that Gene and Angie Mitchell ever approved of the policy. (Tr. at 100:1-22).

Ms. Helms admitted to having contact information for many persons she worked with at Kelly’s and, yet, not one of her co-workers was called to testify in support of her story. (Tr. at 104:1-10; 105:1-8). She also stated that the individuals she had contact information for would certainly remember an environment of frustration with schedules. (Tr. at 107:4-11).

Ms. Helms testified that she was concerned about the new hires taking “our shifts.” (Tr. at 114:5-8). The persons she mentions that she talked to about this issue were Kris Flood, Sarah Clark, and Chris Healy, none of whom actually testified at the trial and none of whom Respondent was made aware of prior to the hearing. (Tr. at 114:9-13). Ms. Helms also testified that certain shifts were preferred by bartenders because tended to be more lucrative. (Tr. at



118:8-119:25). Ms. Helms was then confronted with schedules from the dates discussed at Kelly's Taproom which showed her to be working the "preferred shifts" virtually every week. See Respondent's Exhibit 1; (Tr. at 121:19-125:8). Ms. Helms admitted that she was "rarely" concerned with scheduling prior to Mike Bevevino leaving in Spring of 2015. Ms. Helms even admitted that with the staffing changes, Kelly's "absolutely" needed to hire people. (Tr. at 141:11-12; 140:1-3). Ms. Helms further admitted that despite her concerns, she was still getting scheduled for the "choice shifts" in April 2015, the month of her termination. (Tr. at 138:22-24).

Ms. Helms further admits that she e-mailed or called Angie or Gene Mitchell about her concerns. (Tr. at 125:10-25). Ms. Helms then completely denied the issue of refusing to serve a patron ever came up despite every other person involved present at the meeting testifying to the contrary as shown below. (Tr. at 127:3-16; 128:24-129:1). Ms. Helms even admitted that such an accusation was something she would remember. (Tr. at 133:9-16).

### **C. Gene Mitchell's Testimony**

Gene Mitchell is the Owner and Managing Partner of Mid-Atlantic Restaurant Group, which operates Kelly's Tap Room. (Tr. at 156:12-5). Mr. Mitchell was called by General Counsel in their case in chief as a 611(c) witness as well as in Respondent's case in chief. This section will deal with both sets of testimony. Mr. Mitchell acknowledged that there were occasionally concerns about shifts. (Tr. at 159:7-25). Mr. Mitchell testified further that Ms. Helms' complaining affected employee morale though it was not specifically about shift schedules. (Tr. at 163:5-10). Mr. Mitchell stated that Ms. Helms' never brought anything to his attention about people other than herself. (Tr. at 171:5-11). Mr. Mitchell also clearly testified that Ms. Helms' complaints about shift scheduling absolutely did not factor in the decision to

terminate her employment. (Tr. at 171:21-172:1). Mr. Mitchell also clarified that complaints about shifts were about:

Bartenders really wanting the best shifts. They always want Thursday, Friday, and Saturday night shifts. Sometimes people have to work a Monday or Tuesday in a restaurant, has to open, so I know the manager and Angie try to balance out the better shifts with some of the folks that chip in and take the not so great shifts. So it's the nature of the industry that people want to maximize their return. It's human nature. I mean that's just what happens.

(Tr. at 173:2-10).

Mr. Mitchell was also called as part of Respondent's case-in-chief and testified he is the general manager of Kelly's but relies on Angie Mitchell for the day-to-day operations as he has another full-time job. (Tr. at 279:1-280:25). Mr. Mitchell explained that the managers at the particular restaurants are tasked generally with handling matters so as to not overwhelm the Mitchells, "[b]ut if there was ever a problem that the manager was not addressing, either properly or...punctually, there was open lines of communication." (Tr. at 282:4-17). Mr. Mitchell confirmed that everyone who worked at Kelly's has his and Mrs. Mitchell's e-mail and many have their cell phone numbers. (Tr. at 283:6-13). While Mr. Mitchell tries to rely on managers for decisions, he stated that as the owner he is "ultimately responsible." (Tr. at 283:16-20). Mr. Mitchell stated that he never took action against someone for reaching out to him. (Tr. at 283:21-25).

As to Ms. Helms, Mr. Mitchell did receive complaints about her and said:

They were generally from her coworkers that she was very difficult to work with. Robin on the nights that she worked would work at the upstairs bar. And I was getting more and more concerns from employees that they didn't want to work upstairs with Robin because she was just unpleasant to be around.

(Tr. at 284:23-285:7). He was aware that she had raised concerns about shifts to Ryan Henry and that they were about her shifts and not about other people. (Tr. 285:8-20). Mr. Mitchell was



told about the incident involving Ms. Helms refusing to serve an African-American patron and making racially charged statements to fellow employee Chelsea Heyward (an African-American employee) by Mrs. Mitchell. (Tr. at 288:9-16). Mr. Mitchell testified regarding the incident:

It was definitely minority discrimination in my mind, which was alarming to say the least. I mean, it's alarming that we're not serving patrons. But it gets to a whole nother [sic] level and degree of escalation in my mind when it involves an African American minority. And particularly as it pertained to Chelsea because she's also African American. And generally speaking, we thought she was good for our business, so it was a concern...[o]bviously, we don't condone discrimination. The reverberations in the community for an event like that should it have been gotten to a higher level is very difficult to overcome. I mean, in any business. So that's a concern. So there was a moral ethical concern on my part. And there was business concern on my part. There was a concern because a good individual was leaving the company because of this issue, so it was on several different levels.

(Tr. at 288:7-289:4). When Mr. and Mrs. Mitchell spoke of this incident there was no discussion about complaints regarding shift schedules and Mr. Mitchell determined that they needed to address the issue with Robin. (Tr. 289:16-24).

The intent of the meeting with Ms. Helms "just to understand what happened...[o]ne, what happened with that specific issue, but then also to address with Robin that there was some serious complaints from her coworkers that they didn't want to work with her anymore." (Tr. at 290:12-25). Mr. Mitchell felt he needed to deal with the issue personally because "the complaints had been ongoing about Robin on...working with her" and the incident with Ms. Heyward was the "paramount reason." (Tr. at 291:1-11). Mr. Mitchell stated to Ms. Helms that they had been getting complaints about her and asked her what was going in that she seemed burnt out. Ms. Helms said "[y]ou're right. I should have left a couple weeks ago. I can't take it anymore" and Mr. Mitchell said to her "[o]kay, I guess we're done here." (Tr. at 292:4-19). Mr. Mitchell then left the meeting because he thought it was over. (Tr. at 292:20-25).

Mr. Mitchell confirmed that there was no discussion of shift schedules and that issue was absolutely not in his mind when the decisions were made. (Tr. at 293:4-16). After Ms. Helms acknowledged her unhappiness, Mr. Mitchell said “at that point, to me, that was a mutual understanding that this was no longer a place for her to work” and he left the meeting. (Tr. at 293:23-294:2).

At one point in cross-examination, General Counsel attempted to make the somewhat offensive inference that racism was not a big deal because Villanova is predominately white area. (Tr. at 305:9-12; 306:4-9) (“Have you -- isn’t it true that Villanova’s nickname is Vanilla Nova?”). Mr. Mitchell explained his concerns about fellow employees as follows:

It’s not a good working environment. It’s, how would [African-American employees] feel, I mean, if they felt like one of their colleagues that they’re part of a team with is refusing service to another African American ... I was concerned that they would find another good place to work. They’re valuable employees. If they realized that one of their team members and coworkers was refusing service to another African American, that’s a concern for me. It’s not a good working environment.

(Tr. at 310:8-311:12).

**D. Angie Mitchell’s Testimony**

As with Mr. Mitchell, Angie Mitchell was called both as a 611(c) witness by General Counsel and in Respondent’s case in chief. Ms. Mitchell is the bookkeeper and general manager of Kelly’s. (Tr. at 174:15-17). Ms. Mitchell said she was aware of Robin Helms and Kris Flood having concerns about scheduling in April of 2015, but not Chris Healy or Sarah Clark. (Tr. at 176:7-177:2). Again, none of these persons were mentioned anywhere prior to the day of trial.

In any event, Ms. Mitchell acknowledged telling Ms. Helms that she had been complaining to everyone except Mr. and Mrs. Mitchell about her concerns. (Tr. at 178:23-179:3). Mrs. Mitchell confirmed that each person’s complaints regarding shifts was in regard to “their own position” and each seemed to advocate only “individually.” (Tr. at 179:17-21).



In Respondent's case in chief and stated that Kelly's Tap Room is "just an individual family bar." (Tr. at 245:19-21). Mrs. Mitchell is both the HR department and the accountant for the restaurant. (Tr. at 247:9-12). Mrs. Mitchell testified that she has told every employee that she has an open door and anybody can come to her with anything. (Tr. at 248:4-7). Mrs. Mitchell provide employees with her cell phone and e-mail address. (Tr. at 249:7-17).

Mrs. Mitchell stated with regard to her managers' decisions "I have to make sure that if the policy, or if a decision is made, it affects everybody the same way and it doesn't bring other people down." (Tr. at 248:22-249:6). As to shift scheduling, Mrs. Mitchell testified that scheduling is done weekly based on everyone's availability and the managers balance out everyone's needs and requests. (Tr. at 249:20-250:17). Ms. Helms' schedule was such that she was only available for certain days and times. (Tr. at 253:21-254:5). Mrs. Mitchell testified that the most lucrative shifts are Thursday, Friday, and Saturday, and that Ms. Helms typically worked those days while she was employed at Kelly's. (Tr. at 255:16-256:11).

Mrs. Mitchell stated she did get complaints from people that worked with Ms. Helms in that "[t]hey said she complained a lot [and] She was negative, and they didn't want to work with her." (Tr. at 255:16-19). There were individuals that requested to not be scheduled with Ms. Helms because of Ms. Helms' complaining. (Tr. at 257:3-17). Ms. Helms was previously disciplined for giving away free drinks in the Summer of 2014, but she was not dismissed. (Tr. at 258:13-259:21).

Mrs. Mitchell hired three new people as a result of two bartenders leaving and experiencing issues with scheduling. (Tr. at 259:15-260:18). There was some concern about shifts from Ms. Helms and Kris Flood, who still works for Kelly's and has been promoted. (Tr.

at 261:2-15). As with everyone else, Mrs. Mitchell testified that Ms. Helms was always advocating on her own behalf and not others. (Tr. at 264:5-18).

Mrs. Mitchell spoke to Chelsea Heyward, an employee hired in April 2015, when she quit and Ms. Heyward relayed that she had done so because she did not like the environment. (Tr. at 265:19-266:3). Particularly, Ms. Heyward said to Mrs. Mitchell that Ms. Helms “was mean to her and said these nasty things” and that “Robin Helms is a racist.” (Tr. at 266:8-13). Mrs. Mitchell was very “upset” and Ms. Heyward said that this “kill your business” if others do this. (Tr. at 266:15-267:19). Mrs. Mitchell was concerned about the potential reaction from the community if an incident like refusing to serve an African-American patron became well known and if Kelly’s became known as a racist establishment, it would have “killed” the business. (Tr. at 268:7-11). In addition, the business and ethical concerns, it put Kelly’s in an awkward legal position in that Mrs. Mitchell “immediately thought Chelsea could sue me today probably for a racist remark to a minority employee.” (Tr. at 269:18-20). Ms. Heyward didn’t want to be identified so Mrs. Mitchell planned to lie to Ms. Helms about how she knew about the incident to protect Ms. Heyward. (Tr. at 269:3-270:7).

Mrs. Mitchell determined to call in Ms. Helms on her next shift to discuss this incident and that took place of April 30, 2015. (Tr. at 270:11-20). The meeting involved Ms. Helms, Mrs. Mitchell, Mr. Mitchell, and Ryan Henry, although Mr. Mitchell arrived a few minutes late. (Tr. at 272:16-20). Mr. Mitchell asked Ms. Helms if she was happy and if there is something going on. Ms. Helms confirmed that she was not happy and admitted denying service to a patron after initially denying it. (Tr. at 271:23-272:9). Mrs. Mitchell said to Ms. Helms “I have a lot of people that come in here that are black...[a]nd this lady happened to be black...[a]nd you said it to a black coworker.” (Tr. at 272:10-12). Mrs. Mitchell expressed her concern that this incident



would become known by African-American persons in the Villanova community that give Kelly's a lot of business. (Tr. at 272:13-19). There is no dispute that this was a great concern to Mr. and Mrs. Mitchell, despite General Counsel again attempting to make the assertion with Mrs. Mitchell (as General Counsel had with Mr. Mitchell) that racism was not a big deal due to the Villanova area's demographics. (Tr. at 347:11-12) ("Q: Is it correct that the overwhelming majority of the customers of Kelly's are Caucasian?").

Upon Ms. Helms admission, Mr. Mitchell stated "I can't have this, you're unhappy, we're unhappy, we can't run a business like this...[y]ou shouldn't be working here if you're this unhappy." (Tr. at 272:20-25). There was no mention in this meeting about shift scheduling by anyone. (Tr. at 273:4-10). Mr. Mitchell said Ms. Helms cannot work at Kelly's if she is unhappy because incidents like the one at issue are what happen and Ms. Helms said "Okay." (Tr. at 273:14-19).

Mr. Mitchell left the meeting and Mrs. Mitchell was a little taken aback:

'[b]ecause nobody went -- we didn't meet at the anticipation of it ending that way. It evolved that way, and when she said she's unhappy, she admitted she didn't serve the lady. And it was more, it felt to me like a mutual separation...[y]ou're unhappy, we're unhappy, these are what happened, let's just part ways. So it was a stunning moment that I didn't expect it to go that way. I didn't know that meeting was going to go like that. But it did. So I stayed so to listen.

(Tr. at 274:1-13). After this, Ms. Helms stated that she was "miserable" and that she was upset about the new hires and not knowing when she would be scheduled. This was not brought up during the meeting and Mr. Mitchell, who made the decision, was not told anything about scheduling. (Tr. at 275:1-9). Mrs. Mitchell also stated that there was no policy about not serving individuals that do not tip and if she heard of it, she would be "irate." (Tr. at 275:12-24). Mrs. Mitchell confirmed that she is often contacted by staff about scheduling and no one is ever discouraged or punished for doing so. (Tr. at 276:6-24).

Mrs. Mitchell testified about her e-mails and correspondence from her staff regarding scheduling. Respondents admitted the e-mails Ms. Mitchell received from her staff during Robin Helms' employment showing approximately 102 pages of contacts between employees and Mrs. Mitchell about scheduling issues. (Tr. at 332:21-22). Mrs. Mitchell testified that no one was ever punished or reprimanded for approaching her with these issues. (Tr. at 333:7-10). Respondent also admitted approximately 25 pages of text messages between Mrs. Mitchell and her staff regarding scheduling issues. (Tr. at 336:1). These were only the ones that Mrs. Mitchell was able to print out because there were too many overall<sup>6</sup>. (Tr. at 336:4-10). Again, no one was ever reprimanded or disciplined for approaching Mrs. Mitchell with these issues. (Tr. at 336:11-15).

Mrs. Mitchell did testify that Ms. Helms mentioned shift scheduling issues in her termination meeting, but that it came up only after the decision was made to terminate Ms. Helms. (Tr. at 353:17-21; 353:19-24). Mrs. Mitchell did make clear that when Ms. Helms discussed those concerns, it was only Ms. Helms' issue and not anyone else's. (Tr. at 355:16-21).

#### **E. Chelsea Heyward's Testimony**

Chelsea Heyward is a former employee of the Respondent and was called as a witness by Respondent. Ms. Heyward is a bartender and currently works for Route Restaurant in Philadelphia. (Tr. at 182:20-183:1). Ms. Heyward testified that she found Mr. and Mrs. Mitchell

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<sup>6</sup> As stated in Court and in *supra*, the bare bones nature of the Complaint, in even its most favorable reading for the Government, did not provide notice that there were complaints about communication issues with Mr. and Mrs. Mitchell and their employees. As such, Counsel and the witness worked through the night after the first day of trial to print out emails and text messages to completely disprove this absurd statement. However, due to the time constraints, Counsel was unable to print out all, or even close to all, of the communications between Mr. and Mrs. Mitchell and their staff.



“nice” and “approachable” in her first encounter with them and that they worked with her schedule as a new mother. (Tr. at 184:5-185:10).

Ms. Heyward was trained by Robin Helms and her impression of Ms. Helms was “she was stressed out about new hires, that she wasn't really happy perhaps with the new hires, like myself, being there...[and] she needed to talk to the management about making sure that it did not affect her scheduling whatsoever.” (Tr. at 187:1-8). Ms. Heyward also said that Ms. Helms stated that if she found out the new hires were getting certain shifts and she was not, she would be “really pissed off about it.” (Tr. at 188:4-12). Ms. Helms expressed to Ms. Heyward, a new employee, that she “just wasn’t happy with really anything there.” (Tr. at 189:10-11). Ms. Heyward continued that Ms. Helms “went downstairs and she kind of cornered Ryan [Henry] with another employee that we had there who came in on her day off and they basically kind of aggressively told him like what's our schedule, our schedules better not be affected, there are new people being hired here, and...that her schedule better not be affected.” (Tr. at 190:9-24).

Then Ms. Heyward recounted an incident involving Ms. Helms in which two African-American girls came into Kelly’s Tap Room and Ms. Helms “recognized them and she basically said that she was not going to serve them, that they never tipped her, and so she refused to give them service.” (Tr. at 191:16-18). Ms. Heyward stated that Ms. Helms “basically just said I'm not waiting on those two black girls and was like if you want to wait on them you can but I'm not going to do it...[and] I went over and I waited on them.” (Tr. at 191:23-25). When Ms. Heyward reported to Ms. Helms that the girls actually tipped her well, Ms. Heyward testified as follows:

And [Ms. Helms] said to me, well, it must be because you're black, too. And I said that's really ridiculous. And then I just kind of like shoved it underneath how I felt about it because I felt like for you to tell a black girl that you're not going to wait on two other black people, I would think that you would know that that would be offensive to me

whether you didn't or not. So when she told me the only reason I probably got tipped by them was because I was also black, too, *the whole situation was offensive*.

(Tr. at 192:7-15) (emphasis added). Ms. Heyward found that Ms. Helms apparently “had no problems making racist comments in front of an African American person without thinking twice about it.” (Tr. at 192:21-22).

Ms. Heyward testified that at this time she told Mrs. Mitchell she was leaving Kelly’s. (Tr. at 197:19-20). In that same conversation, Ms. Heyward relayed the incident involving Ms. Helms and the way she felt other employees made her feel. (Tr. at 196:17-197:11). Mrs. Mitchell asked if there was any way she could convince Ms. Heyward to stay, but Ms. Heyward had found another position and felt the energy at Kelly’s was “negative.” (Tr. 197:18-198:1). Ms. Heyward specifically testified that in talking to Mrs. Mitchell about Ms. Helms she said “I raised the issue with the two girls that came in that I felt like [Helms] really clearly wasn't paying attention that her comments were to a black girl about not wanting to wait on black people.” (Tr. at 196:17-25).

Ms. Heyward stayed on for two weeks after she told Mrs. Mitchell that she was leaving and after Ms. Helms was terminated, the negativity she experienced previously was gone. (Tr. at 199:1-17). Ms. Heyward also testified that Ms. Helms’ complaints were always directed her own interest. (Tr. at 199:18-25). Ms. Heyward no longer works at Kelly’s Tap Room and has no financial ties to it or the Mitchells. (Tr. at 200:5-8).

#### **F. Michael Bevevino’s Testimony**

Respondent called Michael Bevevino as a witness who previously worked at Kelly’s Tap Room. (Tr. at 357:6-19). Mr. Bevivino no longer works at any establishments owned by Mr. or Mrs. Mitchell. (Tr. at 358:4-6). Mr. Bevevino was familiar with Ms. Helms and said that she complained about “crappy shifts,” but in his experience, they were only Ms. Helms’ complaints



and no one else's. (Tr. at 359:6-360:6). Mr. Bevevino stated that while Ms. Helms was positive to the customers, she was not always positive to co-workers. (Tr. 359:15-17). Every bartender has to work "crappy shifts" and Ms. Helms was not happy about having to work those shifts. (Tr. 359:18-360:2).

He further said that never knew Ms. Helms to go to management on behalf of others and that her complaints were relating to Ms. Helms only. (Tr. at 360:18-23). Mr. Bevevino further stated that he never had a problem going to Gene or Angie Mitchell with any concerns. (Tr. at 361:13-20).

#### **G. Robert Stedeford's Testimony**

Respondent called Robert Stedeford to the stand and Mr. Stedeford is a manager at another restaurant owned by Mr. Mitchell. (Tr. at 368:22-25). Mr. Stedeford had contact with Ms. Helms when he worked at Kelly's Tap Room and found her "difficult to work with" and "always seemed to be an issue of not getting the appropriate shifts that she deemed appropriate." (Tr. 369:22-370:3). Mr. Stedeford testified that Ms. Helms' complaints were relating to her only. (Tr. at 370:14-18).

Mr. Stedeford confirmed that he has never had any problems approaching Gene and Angie Mitchell with issues. (Tr. at 371:1-13). Mr. Stedeford also confirmed that Ms. Helms and Kris Flood complained for themselves, individually, and not others. (Tr. at 378:1-7).

#### **H. Ryan Henry's Testimony**

Respondent called Ryan Henry as a witness, who was a manager at Kelly's Tap Room and no longer works for the Mitchells in any capacity. (Tr. at 383:22-25; 385:15-17).

Respondent was initially not going to call Ryan Henry and did not subpoena him. Only when

Ms. Helms testified to her wholly unsupported and false version of events did Respondent quickly subpoena Ryan Henry's appearance.

Mr. Henry was present at the meeting where Ms. Helms was separated from Kelly's Tap Room. (Tr. at 380:4-25). Mr. Henry testified:

So I was asked to get Robin Helms, not knowing what the topic was. I brought her down to the office. There were some questions about behavior specifically relating to at one point discriminatory acts regarding race. I was listening to that conversation. At that point when she was asked about that specific piece about race, she had agreed that she had, how do I put it, done that act, I guess. And from there she was let go. And I was witness to that.

(Tr. at 381:5-12). As to the reason Ms. Helms was let go Mr. Henry stated "I believe it was directly tied to the discriminatory act...[r]egarding race." (Tr. at 381:13-16). Mr. Henry therefore supported the version of the facts posited by Respondent despite having no connection to either party at this point.

Mr. Henry also confirmed that he generally did not have troubles contacting Gene and Angie Mitchell regarding problems. (Tr. at 381:17-382:6). Mr. Henry also stated, as every witness but Ms. Helms did, that Ms. Helms' complaints were solely about her and not others. (Tr. at 382:22-383:1).



## ARGUMENT

### **A. The Government's Tactics, Resulted in a Fundamentally Unfair and Unjust Process**

As stated above, the charging documents in this gave precious little information about the claim. Several of the persons that factored heavily in the decision of the ALJ, including Kristen Lang, Kris Flood, and Sarah Clark were not mentioned anywhere and there was no possible Respondent could have known about them in order to have an opportunity to call them as witnesses. In a further act of deception, General Counsel, without amendment and out of the gate, *quadrupled* the timeframe of the Complaint during its case-in-chief, as well as offered Kristen Lang as a supervisor within the act, also in their case-in-chief. If Respondent had known that Robin Helms was going heavily rely on the statements of these individuals, as well as this timeframe in her testimony, Respondent would have prepared its case accordingly. The fact that this was purposely withheld deprived the Respondent of the most basic fairness at the heart of the rules of procedure. See Swift & Co. v. U.S., 308 F.2d 849, 852 (7<sup>th</sup> Cir. 1962) ("Due process in an administrative hearing, of course, includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law.").

This highlighted by the fact that Respondent noted this extreme scarcity of information and filed a motion for a bill of particulars, which was vehemently opposed by General Counsel, and denied by the Court. Furthermore, General Counsel repeatedly told the Court, in response to direct questions about amendments, Respondent's concerns and the scarcity of facts in the complaint, that there were no additional facts and no amendments. This was absolutely false. General Counsel, rather, went to present a case that relied entirely on the testimony of Robin Helms about several other persons and dates that were never mentioned prior to the day of trial.

As stated above, the Complaint was extremely bare-bones and gave virtually no detail. There was no mention prior to trial of the co-workers that Ms. Helms mentioned in her testimony. In fact, as noted above, General Counsel sought to add additional persons as agents and supervisors under the Act after trial had begun. These tactics led to Respondent being hamstrung in their case. Respondent's Counsel specifically objected to the tactics of General Counsel in this matter and the effect it had on Respondent's ability to prepare the case. As a matter of fundamental fairness, the Complaint and supporting documents must provide adequate notice of the charges against a party. See Curtiss-Wright Corp., Wright Aeronautical Div. v. N. L. R. B., 347 F.2d 61, 72 (3d Cir. 1965) ("The propriety of a pleading is today judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought.").

This tactic is even more egregious given the fact that the Court and Counsel for both parties, as stated, engaged in no less than four (4) phone conferences in the weeks and months leading up to the hearing. Counsel for the Government was repeatedly asked by both the Court and Respondent's Counsel if there were any amendments to the Complaint. Each time Counsel stated that "there maybe" but that it would be "nothing substantive". After the last call, the Government stated that the amendment would be the removal of one (1) part of a sentence, which was done at the hearing. It was never stated that there may be additional amendments. More importantly, the expansion of the dates at issue and the addition of a supervisor/manager is clearly a substantive change.

The fundamental issue surrounding this is underscored by the ALJ's ruling in which the ALJ acknowledges in a footnote that he stated in the proceeding that allegations not contained in the Complaint would not be considered regarding previously undisclosed supervisor Kristen



Lang. See Decision at n.3. Shockingly, the ALJ then spends half of his decision considering, and relying upon, that very thing. See Decision at 3-4, 7-8, 17-18. The prejudice to Respondent in this respect is enormous.

In fact, entire sections of the Decision reference issues occurring long before the time periods alleged in the Complaint and despite the ALJ saying they would not be considered, they clearly were considered. See Decision at 3-4; 7; 19. The consideration of these items with no notice whatsoever to Respondent and *in direct contrast to the ALJ's clear ruling* (upon which Respondent reasonably relied) that they would not be considered rendered the entire process fundamentally flawed. This is especially so when Respondent specifically moved for a Bill of Particulars because of the bare bones nature of the Complaint. This matter should be overturned and dismissed on this basis alone.<sup>7</sup>

**B. The ALJ's Credibility Judgments Are Unsupported and Inconsistent with the Actual Record**

The finding in this matter is inherently based on believing everything that Robin Helms said and disbelieving or “not crediting” everything that everyone else in the universe said. The ALJ gives no explanation for why he did so and entirely fails to address the significant contradictions and problems with Robin Helms’ testimony. In fact, ALJ states that General Counsel’s case rested “in large part on the testimony of Helms.” See Decision at 2. This is a false statement in that General Counsel’s case rested *entirely* on the testimony of Helms and the ALJ failed address the severe problems with her testimony, as explained below. The ALJ seems to assign weight to Robin Helms’ “detailed” recall of events, but fails to take into account that it is easy to be “accurate” when you are making it up as you go. The ALJ went so far as to

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<sup>7</sup> At the very least the matter should be re-tried due to the enormous prejudice to the Respondent resulting from the above.

discredit everything that everyone else said that conflicted with Robin Helms' story without any actual support. This was a severe abandonment of the ALJ's obligation to examine the evidence fairly and consistently with what is presented.

While an ALJ's credibility determinations are typically afforded weight, when they are completely unjustified and clearly and unequivocally against the weight of the evidence, as they are here, they can be overridden. See Standard Dry Wall Products, 91 NLRB 544 (1950) enfd 188 F.2d 362 (3<sup>rd</sup> Cir. 1951). First and perhaps most importantly, the ALJ fails to take into account that General Counsel failed to call as witnesses the other persons Robin Helms mentioned in her testimony as acting with her. This is crucial in that it goes to both credibility and, as explained below, whether there is any proof of concerted activity in this matter.

General Counsel did not call **any** of the fellow employees mentioned as witnesses to corroborate Ms. Helms' story. The judge may weigh the General Counsel's failure to call an identified, potentially corroborating bystander as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred. See Queen of the Valley Hospital, 316 NLRB 721 n. 1 (1995). If Ms. Helms did indeed advocate with other employees, as she seems to claim, then her credibility would be boosted by calling those other persons (or even a single one) who could acknowledge those actions. As it was, every person that testified in the matter except for Ms. Helms, testified that Ms. Helms' actions and complaints were hers alone and that she always was only concerned about her shifts. See (Tr. at 355:16-21) (Angie Mitchell); (Tr. at 360:18-23) (Mike Bevevino); (Tr. at 382:22-383:1) (Ryan Henry); (Tr. at 378:1-7) (Robert Stedeford); (Tr. at 199:18-25) (Chelsea Heyward). Ms. Helms' failure to call **a single other person** to support the idea that her complaints were for



persons other than herself should weigh very heavily against her credibility and it was error for the ALJ to fail to address this issue.

It is important to note the length the ALJ went to credit Robin Helms testimony, and a noteworthy example sits in the manner in which the ALJ assessed the credibility of the witnesses that Respondent called. General Counsel did not ask any of Respondent's witnesses *any* questions to corroborate *any* of the "facts" to which Ms. Helms testified to. In the decision, the ALJ held that it was corroborating evidence that Respondent did not ask specific questions to disprove certain minor portions Robin Helm's testimony (Decision at n. 14), and made no mention of General Counsel's failure to corroborate Ms. Helms. This bears noting for two reasons. First, it strongly suggests the ALJ impermissibly shifted the burden of proof in this matter. Second, it forcibly underscores the fact that the ALJ, without hesitation, took Ms. Helms' testimony as the absolute truth, and did not even put it's veracity through a cursory evaluation.

Furthermore, the deceptive tactics of General Counsel leading up to the hearing should be considered when assessing the failure of General Counsel to call these witnesses, as the lack of notice and fairness prevented Respondent from calling them. General Counsel was the only one, up until the hearing, that was aware of these facts and witnesses. Their failure to call them should be viewed with gravely weary eyes.

Another very important oversight was that Ms. Helms testified that she was unable to or was discouraged from contacting the owner and manager of Kelly's Gene and Angie Mitchell regarding scheduling or complaints. Every other witness in this matter refuted that assertion and stated that Gene and Angie Mitchell are approachable and have an open door. Angie Mitchell showed and testified about over 100 pages of texts and e-mails to and from her staff about shift

scheduling issues. If given more time, as Respondent was shackled by the ambush style hearing the Government engaged in during this matter, more would have been produced. Ms. Helms' testimony in this regard was unquestionably proven to be not credible and nothing more than a manufactured excuse as to why she failed to raise her "concerns" to the most important persons within the establishment.

The ALJ dismisses this extremely important physical evidence and entirely misses the point with regard to them. The ALJ flippantly states that these messages reflect "routine notifications such as being late for work or covering the shift of another employee." See Decision at 21. This of course is completely off the mark. The fact that all of these other employees felt completely comfortable contacting Mrs. Mitchell about scheduling issues proves conclusively that Robin Helms' story that she was discouraged from or could not approach the Mitchells about scheduling is complete nonsense and that Robin Helms clearly lied about those issues to explain why she never raised her "concerns" with Mr. and Mrs. Mitchell. This conclusion is further supported by the testimony of everyone else who testified and said that Mr. and Mrs. Mitchell are easy to approach and talk to about matters. See, e.g., (Tr. at 381:17-382:6); (Tr. at 361:13-20); (Tr. at 371:1-13).

This is especially so considering the testimony of Michael Bevevino and Ryan Henry, both of whom Ms. Helms alleged had discouraged her from contacting Gene and Angie Mitchell with complaints. When Mr. Bevevino and Ryan Henry actually testified, they testified completely opposite regarding the approachability of the Mitchells. See (Tr. at 361:13-20); (Tr. at 381:17-382:6). Furthermore, Bevevino testified that he had no awareness of Robin going to management with complaints. (Tr. at 360:10-15). Mr. Bevevino and Mr. Henry have no relationship to any party in this case and both of them directly contradicted Robin Helms'



fanciful story of not being able to go to Gene and Angie Mitchell. Respondent could have also called Kristen Lang who would have also contradicted Ms. Helms' story had she been mentioned prior to the first day of trial as noted above.

Gene Mitchell also testified that Robin Helms came to him wanting longer shifts and that he told Ryan Henry. (Tr. at 170:16-171:4). Even though is completely consistent with all testimony and physical evidence, the ALJ decided that this must not have happened because this was implausible given Robin Helms' statements about being afraid to go to them and being discouraged from doing so. See Decision at 6. The conclusion that is far simpler, consistent, and entirely supported by the all testimony and physical evidence, other than Robin Helms' word, is that Robin Helms was not telling the truth about being able to go Eugene and Angie Mitchell about issues. This is simply inescapable and one has to ignore so much, as the ALJ did, to come to the opposite conclusion. Why is everyone else in the entire universe but Robin Helms, the one who stands to gain the most from lying, mistaken or lying? The fact that the ALJ failed to comprehend this extremely simple and conclusive point is further evidence that there was no real effort to judge the evidence on its merits.

The ALJ's treatment of the testimony of Chelsea Heyward is also emblematic of how illogical the "credibility" determinations were in this matter. Most damning and telling is the "finding" that the ALJ tries to bury in footnote. In footnote 9 of the ALJ's opinion, he credits a portion of Chelsea Heyward's testimony to find that a meeting between Helms, Kris Flood, and Ryan Henry occurred in mid-April instead of in March as Ms. Helms testified to. See Decision at n. 9. This is absolutely stunning in the ALJ later discredits portions of Heyward's testimony that support Respondent's case. However, where Heyward's testimony helped Ms. Helms by correcting something Ms. Helms "got wrong", it was credited by the ALJ. Of course there was

no mention of the fact that this shows Ms. Helms recall of events was not as perfect as the ALJ purports them to be. To put it simply, the ALJ credited every portion of Ms. Helm's testimony that helped her case, discredited any portion that hurt her case, then discredited all of Ms. Heyward's testimony with the exception of crediting any part that helped Ms. Helm's case. This statement, as absurd as it sounds, is sadly, absolutely true.

In addition to the above, the ALJ's judging of other portions of Ms. Heyward's testimony, an independent witness, reveals the incredible bias at work. For instance, the ALJ attacks a portion of Heyward's testimony in which she stated that she remembers Robin Helms telling her that if she was unhappy at Kelly's Tap Room she should look for other employment. See (Tr. at 189:5-15). The ALJ, without citation or actual reasoning, finds this to be "implausible." See Decision 10. The ALJ states falsely that there "is nothing in Heyward's testimony, however, to indicate that she had ever told Helms that she was unhappy at Kelly's." See id. This is completely false as Ms. Heyward consistently said that she was not happy during her initial period at Kelly's due to Ms. Helms' actions. (Tr. at 196:17-197:11).

Furthermore, when viewed in context, Ms. Heyward's testimony was expressing that Robin Helms was unhappy and negative. It was an illustration of how Ms. Heyward found working with Ms. Helms and that she was a negative influence, i.e. it is surprising that Ms. Helms would say something like that to a new hire. There is nothing implausible about this and completely fits with the fact that Ms. Heyward testified about Robin Helms negativity and difficulty working with her, as did other witnesses. (Tr. at 199:1-17).

The ALJ then credits just enough of Heyward's testimony to save face for Robin Helms. See Decision at 10. Even the ALJ has to admit that Heyward would not have invented the incident about failing to serve an African American customer or the racist statements made an



African-American co-worker, but still found that Ms. Helms did not refuse to serve an African-American customer even though Ms. Heyward testified as such, and has absolutely no reason whatsoever to lie for Respondent. So in a nutshell, when Ms. Heyward helps Ms. Helms, she is believable, but when she helps Respondent, she is not believable. This is emblematic of the ALJ going to any lengths necessary to credit everything that helped Ms. Helms and discredit everything that helped Respondent.

The ALJ continued with this line of thought, for reasons that are completely unexplained, fails to credit undisputed testimony from Angie Mitchell stating that Ms. Heyward told her about the incident involving an African-American patron stating simply: “Mitchell’s testimony is not corroborated by Heyward in important respects....” See Decision at n. 16. The ALJ does not bother to enumerate what those important respects might be, but the actual record shows that Mrs. Mitchell and Ms. Heyward say **precisely** the same thing about this phone call.

As cited above, Ms. Heyward specifically testified that in talking to Mrs. Mitchell about Ms. Helms she said “I raised the issue with the two girls that came in that I felt like [Helms] really clearly wasn’t paying attention that her comments were to a black girl about not wanting to wait on black people.” (Tr. at 196:17-25). Mrs. Mitchell stated that “Mrs. Mitchell spoke to Chelsea Heyward, an employee hired in April 2015, when she quit and Ms. Heyward relayed that she had done so because she did not like the environment. (Tr. at 265:19-266:3). Mrs. Mitchell testified that Ms. Heyward said to her that Ms. Helms “was mean to her and said these nasty things” and that “Robin Helms is a racist.” (Tr. at 266:8-13). Mrs. Mitchell relates that Ms. Heyward said Ms. Helms refused service to a black customer and said “you know, you can’t not serve somebody because they’re black.” (Tr. at 266:15-267:1). One wonders how those statements are inconsistent, but what is 100% undisputed when they are examined is that Chelsea

Heyward, an African-American woman, reported to Angie Mitchell the general manager of Respondent that she was quitting in part due to Robin Helms' conduct that Robin Helms had acted in a racist manner.

The ALJ seeks to inject doubt into this undisputed and doubly confirmed testimony simply because if you accept the actual facts for what actually are, it does not look good for Robin Helms. However, the facts are the facts, and neither General Counsel nor the ALJ raised anything to combat the idea the fact that Respondent was informed of racist actions by Robin Helms and that her separation happened **immediately** thereafter.

In addition to the above, Ms. Helms version of the meeting in which she was terminated is also clearly fabricated in attempt to make herself look better. All other parties in the meeting, including Ryan Henry who no longer works for Respondent, testified consistently about the reasons for Ms. Helms' departure. The ALJ makes several credibility related judgments regarding the meeting that simply do not make sense and are inconsistent with the evidence.

First, the ALJ states without reason that the "fact that the Mitchells created an elaborate fiction regarding the installation of listening devices at the restaurant is indicative of their untrustworthiness as witnesses" and that he does not accept the completely logical explanation that they wanted to keep Ms. Heyward's name out of it. See Decision at 14. This absolutely outrageous and there is no basis for this conclusion. The ALJ says that simply not divulging Ms. Heyward's name would have been sufficient. In short, the ALJ held that he does not find the Mitchell's testimony credible because he would have done it differently.

It is undisputed that the incident involved failure to serve a patron and that Ms. Heyward relayed racist actions to Mrs. Mitchell as noted above. Therefore, unless Ms. Helms made a habit of failing to serve African-American customers and making racist statements to African-



American co-workers, Ms. Helms would have immediately known who made the complaint even if Ms. Heyward was not mentioned by name. What ALJ should have asked was, why would the fiction regarding listening devices be required at all unless the Mitchells wanted to confront Robin Helms about this incident without mentioning Ms. Heyward? They could have just said that they heard from others that Robin Helms that she was complaining if that is all it was. In addition, why would the Mitchells need to protect Ms. Heyward if they knew that they were going to fire Robin Helms as the ALJ seems to believe as there would have been no chance they would work together again? The ALJ fails to see that this, yet again, supports the testimony of the Mitchells that they were not necessarily intending to terminate Robin Helms at the April 30, 2015 meeting. There is nothing inconsistent or indicative of untrustworthiness here and it should have occurred to the ALJ that, once again, this only is a problem if you credit the testimony of Robin Helms against everyone and everything else, which is there is absolutely no reason to do.

The ALJ also makes two other severe missteps regarding the Mitchells' testimony. First, the ALJ falsely finds that Angie Mitchell was "inconsistent" on the issue of race being brought up. This is false in that Angie Mitchell stated on cross examination that she could not recall the extent to which race was brought into the meeting with Robin Helms, which again, does not affect the fact that everyone agrees she was told that. See (Tr. at 351:17-352:12). There was reversal of course, Mrs. Mitchell, unlike Ms. Helms, was trying to be honest about her recollection. As noted by the ALJ, Ryan Henry, an independent testified about race being an issue. (Tr. at 381:5-16). The ALJ attacks this by saying it is inconsistent with Eugene Mitchells testimony about race coming up. This, however, very conveniently ignores the fact that everyone, including Robin Helms, agrees that Eugene Mitchell left the meeting before it was concluded. See, e.g., (Tr. at 274:1-13). The details regarding this are discussed further below

regarding the separation meeting and the ALJ's conclusions about it are completely unsupported for the reasons stated therein.

At one point in the hearing, Ms. Helms unbelievably testified that Mrs. Mitchell stated that Respondent is "a small family business and my hurting their feelings mattered more than my actual job performance." It is absolutely inconceivable that any human being ever actually said something like this, let alone someone like Mrs. Mitchell who runs a successful business. No one who has been in business for more than a week could possibly say something so irrational and foolish. The ALJ entirely sidesteps the absolutely preposterous nature of this testimony and how it affects Robin Helms' overall credibility. In fact, the fact that the ALJ actually cites this portion of Robin Helms' testimony as if it is a stipulated fact and fails to address the completely farfetched nature of it. See Decision at 11. The fact that the ALJ accepts even this completely outlandish portion of Robin Helms' story proves that the ALJ made no actual effort to actual examine the evidence regarding credibility and simply found for Robin Helms at every turn.

The decisions of ALJ on credibility show conclusively that there was no neutrality in this matter. The ALJ, it appears, made up his mind that he was going to find for Robin Helms from the drop of the gravel. He simply credits anything and everything that helped Robin Helms, no matter how far-fetched or unsupported, and discredit anything and everything that supported Respondent. This pathological need to find for Robin Helms in spite of all the actual evidence shows an abandonment of the duties of an ALJ to be fair and impartial. An ALJ has obligation to view the evidence fairly and that simply did not happen here and the Board should disregard the clearly unvetted "credibility judgments" of the ALJ and view the evidence for itself.

**C. The Finding Concerted Activity in this Matter is So Far-Fetched That It Strains the Definition to a Breaking Point**



As an initial matter, it must be remembered that this is an NLRB and it is directed toward organized labor activities. This matter conclusively involved the entirely self-interested actions of **one** employee and it is straining the notions of the NLRA to the point where they become meaningless. The Third Circuit recently decided the case of MCPc, Inc. v. N.L.R.B., 2016 WL 559219 (3<sup>rd</sup> Cir. February 12, 2016). The MCPc case involved the issue of what constitutes “concerted activity” and Respondent asserts that this constitutes the current state of the law in the Third Circuit where this case exists. The NLRA does not precisely define what exactly constitutes “concerted activity” within the meaning of the Act. See NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 830-31 (1984) (“The term ‘concerted activit[y]’ is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals.”). The U.S. Supreme Court has stated that “at some point an individual employee’s actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity.” See id. at 833 n. 10. Therefore, if an employer were to “discharge an employee for purely personal ‘griping,’ the employee could not claim the protection of § 7.” See id.

As a result of the above and the relevant case law, there must be a category of employee complaining that does not constitute “concerted activity,” but if the actions at issue in this case count as the ALJ erroneously found they do, that category would be extremely difficult to imagine. The decision of the ALJ in this matter has caused that area to entirely disappear as what is at issue in this case is necessarily personal and self-interested conduct. There must be some link between the employee complaining and other employees for the activity of the employee cannot be said to be covered by the protections of the NLRA. See Snyder v. Dietz & Watson, Inc., 837

F. Supp. 2d 428, 454 (D.N.J. 2011) (“An individual’s action, even if presumably of interest to other employees, is not in itself ‘concerted activity’ under the NLRB.”).

The MCPc Court stated that “the touchstone for an individual’s concerted activity...remains whether the employee intends to induce group activity or whether the employee’s action bears some relation to group action in the interest of the employees.” See id. The Court also clarified that “[a]lthough merely complaining in a group setting would surely not be sufficient in itself to transform an individual grievance into concerted activity, ...in such circumstances a lack of prior planning does not foreclose a finding of concerted activity, where the individual’s statements **further a common interest or by their terms seek to induce group action in the common interest.**” See id. at \*6 (emphasis added). The Court concluded that “[w]hen synthesized, the relevant precedent from our Court and the Board reflects that the benchmark for determining whether an employee’s conduct falls within the broad scope of concerted activity **is the intent to induce or effect group action in furtherance of group interests.**” See id. at \*7.

Respondent notes that General Counsel in its Post-Trial Brief failed to make any argument whatsoever that Ms. Helms’ conduct should be considered “concerted activity.” An entire section of Respondent’s Brief is devoted to demonstrating that Robin Helms’ purely self-interested conduct could not possibly be “concerted activity.” See Respondent’s Post-Trial Brief to ALJ at 22-26. However, General Counsel made no argument in this regard and the ALJ simply took it upon itself to conclude this on a record that makes such a conclusion impossible to justify.

The case citations utilized by the ALJ are completely inapposite and do not support the finding concerted activity in this matter. The ALJ primarily cites the case of Aroostook County



Regional Ophthalmology Center, 317 NLRB 218 (1995), but this case bears absolutely no relation to the instant case. In that case, there were several employees that were at issue and at least four employees were dismissed for complaining about scheduling and condition changes that had actually occurred. All four employees were admittedly complaining about certain scheduling and working changes, all four were discharged, and the complaints related to items common to all four employees. See id. at 220-21. This bears no relation to the instant action one employee was complaining about supposed scheduling changes that did not actually occur and were not common to anyone other than each individual employee. This case does not simply stand for the proposition that any complaining about scheduling must be concerted as the ALJ seems to find.

This is especially so considering that the ALJ also cites to two cases which even further distance the facts of this case from “concerted activity.” Both the case of Meyers Industries, Inc., 268 NLRB 493 (1984) and Worldmark by Wyndham, 356 NLRB 765 (2011), both confirm that concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” This standard simply does not fit the facts of this case.

First and foremost, the finding of concerted activity by the ALJ is based in large part on the impermissible consideration of prior actions as stated above. All of the discussions of actions previous to the two months prior to Ms. Helms departure, i.e. dates outside of those listed in the Complaint, should not have been considered as stated above.

Nonetheless, the evidence in this matter regarding the appropriate time periods shows conclusively that Ms. Helms was simply complaining about her own position and interests and it is impossible for her complaints to be “group activity” such that they could be concerted activity

under the Act. Initially it is notable that everyone involved in this matter acknowledges that shift scheduling is an issue because some shifts as bartenders are more lucrative than others. (Tr. at 173:2-10). Even Ms. Helms clearly testified that certain shifts were preferred by bartenders because tended to be more lucrative. (Tr. at 118:8-119:25). Everyone wants the best shifts, but not everyone can have them and when one employee is scheduled for a “choice” shift, that necessarily means that someone else cannot be. Therefore, it is simply impossible for any complaints about shift scheduling relating to wanting the “best” shifts to in furtherance of group interests as it is, by very definition, about personal interests.

Ms. Helms, in her own words, was concerned about other bartenders getting the “best shifts.” (Tr. at 118:8-119:25). As described by Ms. Helms, the “best shifts” were those that were the most sought after due to the fact that they were the most lucrative. Id. As such, if Ms. Helms’ complaints were acted upon and she was guaranteed the “best shifts,” every other bartender would lose out on those “best shifts.” It is impossible for the Government to argue that her complaints are “concerted activity” because if management capitulated to her demands, it would have been to the detriment to every other bartender in the restaurant. The ALJ **entirely** fails to address this incredibly important and undisputed point.

Ms. Helms also admits that her complaints about scheduling were limited to the last two months of employment and that she was generally happy prior to that. (Tr. at 21:1-9). Her concerns were essentially whether or not the new hires would take her “preferred” shifts. (Tr. at 98:16-24). Ms. Helms admitted that it was necessary to hire people at Kelly’s and therefore cannot claim that the hiring of new employees itself was the issue. (Tr. at 141:11-12).

Therefore, Ms. Helms’ complaints, even by her own description, were in regard to the necessary



new hires working the “choice” shifts instead of her. As stated above, this is pure self-interest no matter how you want to dress it up.

This testimony also reveals an internal inconsistency in Ms. Helms’ testimony that the ALJ conveniently ignores, i.e. that she testified she was generally happy with scheduling prior to her last month of employment but then talks about prior incidents involving Kristen Lang and others. Robin Helms could not keep her own convoluted story straight about when she was unhappy but the ALJ failed to address this as well as the other issues mentioned above.

The only employees mentioned specifically as joining Ms. Helms were Kris Flood and Sarah Clark. Neither of these persons actually testified at the hearing and were not disclosed prior to the hearing as stated above. Witnesses that did testify confirmed that neither of these employees were dismissed. (Tr. at 261:2-15); (Tr. at 286:10-16). Furthermore, as noted above, in each instance Ms. Helms made it clear that what really mattered to her were the preferred or choice shifts and that she still worked those shifts. Every other witness in this matter that talked about Robin complaining about shift schedules made clear that Ms. Helms’ Complaints were related to her alone. See (Tr. at 355:16-21) (Angie Mitchell); (Tr. at 360:18-23) (Mike Bevevino); (Tr. at 382:22-383:1) (Ryan Henry); (Tr. at 378:1-7) (Robert Stedeford); (Tr. at 199:18-25) (Chelsea Heyward). The ALJ fails to address this overwhelming evidence.

It was furthermore conclusively established that Ms. Helms’ was, despite any concerns or complaining, still being scheduled for her desired shifts up to her termination. See Respondent’s Exhibit 1; (Tr. at 121:19-125:8). Ms. Helms was therefore not even being negatively affected by the thing that she claimed to be concerned about so how could she possibly be bringing “group” complaints about something that was not actually occurring.

In fact, General Counsel failed to present any evidence at all that any employee, including Robin Helms, was *actually affected negatively* during the relevant time periods. This is absolutely crucial and completely missed in the Decision. Not one single person or document, even Robin Helms, was shown to actually have their schedule affected negatively by the new hires. The case law cited by the ALJ and discussed above all involved cases where employees were actually affected by conditions and not simply where there was concern that they might theoretically be affected as is the case here. The ALJ, once again, fails to address this crucial lack of evidence in the decision finding concerted activity.

The undisputed evidence shows that Ms. Helms' complaints, at best, amount to her advocating for her and no one else to receive the "preferred" shifts for herself and that she was still receiving them up until the incident that led to her termination. It would require an extreme expansion of the definition of "concerted activity" to find this kind of necessarily self-interested griping was intended "to induce or effect group action in furtherance of group interests" as required to fit within the definition of concerted activity. Ms. Helms' claims therefore fail because she simply never engaged in any activity that is protected by the NLRA. The ALJ's finding to the contrary is blatant error.

**D. Even Assuming There Was Any Activity That Could Be Described as "Concerted," It Was Proven That Robin Helms' Dismissal Had Nothing to Do With Said Activity**

Even where there is protected activity engaged in by an employee, the fact-finder must still determine that the employee's discharge was related to that protected activity in order to find in the employee's favor. The Court in MCPc, Inc. stated that "[w]here an employer argues that it discharged the employee for reasons unrelated to his protected activity, such as tardiness or poor work performance, we rely on the so-called 'mixed motive' or 'dual motive' discharge test set



forth by the Board in *Wright Line*.” See *MCPc, Inc.*, 2016 WL 559219 at \*9 (citations omitted). Under the *Wright Line* Test, the employee must make a prima facie showing that protected conduct was a “motivating factor in the employer’s decision” and, if that is shown, “the burden shifts to the employer to demonstrate that the ‘same action would have taken place even in the absence of the protected conduct.’” See *id.* This test is designed to “preserve what has long been recognized as **the employer’s general freedom to discharge an employee ‘for a good reason, a poor reason, or no reason at all**, so long as the terms of the [Act] are not violated.” See *id.* (emphasis added).

The Court ultimately reversed the finding for the employee below because “the ALJ and Board’s determination that [the employee] was terminated for his protected statements ... does not appear to take into account significant countervailing evidence in the record indicating that [employer] would have discharged [the employee] regardless of his statements because it believed that he engaged in improper data access, dishonesty, or both.” See *id.* at 12-14.

There was absolutely **no evidence** presented that Ms. Helms’ dismissal was related in any way to protected activity (even if there was protected activity) and Respondent presented overwhelming evidence that the same action would have been taken regardless of any activity. Initially, it is extremely important to note that Ms. Helms testified that in defending her job performance, Ms. Mitchell “said that none of that mattered to them...[t]hat they are a small family business and my hurting their feelings mattered more than my actual job performance.” (Tr. at 68:8-16). Even though there is no way that a human being actually said this as noted above, if you credit Ms. Helms’ version of events, which the ALJ blindly did, and she was in fact terminated for hurting her bosses’ feelings, that would necessarily mean that she was not fired for her alleged protected activity. Therefore, even under Ms. Helms’ illogical and inconceivable

version of events, there was not a violation of the NLRA. The ALJ, despite buying completely into Robin Helms' unsupported and implausible story in every respect, fails to address this incredibly important point.

In addition to the above, there is a mountain of evidence to contradict Ms. Helms' assertion that she was terminated because of complaining about shift schedules. First, Chelsea Heyward offered testimony that Ms. Helms made racist statements and refused to serve African-American customers. Ms. Mitchell and Ms. Heyward both testified that there was phone conversation relaying this incident to Ms. Mitchell and this is undisputed. Both Ms. Mitchell and Mr. Mitchell agreed that this issue needed to be addressed with Ms. Helms. It is undisputed that Ms. Heyward relayed this incident to Ms. Mitchell and Ms. Heyward has no interest in this case to cause her testimony about the incident to be suspect.

The ALJ makes absolutely no effort to explain why the undisputed testimony of both Ms. Mitchell and an independent third party was not credited in this respect and the Board should ignore any such finding. The ALJ attempts to claim there are inconsistencies in Heyward and Mitchell's testimony regarding this phone call but makes absolutely no attempt to what those are. See Decision at n. 16. In reality, both Mitchell and Heyward testified completely consistently that Heyward told Ms. Mitchell that Robin Helms refused service to a black customer and made what Heyward felt were racist statements. (Tr. at 196:17-25); (Tr. at 266:8-267:1). As noted above, there is no basis for not crediting the consistent and undisputed testimony of both Angie Mitchell and Chelsea Heyward that Ms. Mitchell was informed of racist actions by Robin Helms.

At one point, Mrs. Mitchell was quite legitimately concerned that Ms. Heyward could have filed suit against Respondent due to this incident. (Tr. at 269:18-20) (Mrs. Mitchell "immediately thought Chelsea could sue me today probably for a racist remark to a minority



employee.”). As this phone call immediately preceded the meeting at which Robin Helms was separated from Respondent, it is completely nonsensical that it would have nothing to do with the separation. The very next shift after this incident is when Robin Helms was called in to discuss this matter and she was separated.

The ALJ finds that the timing of Ms. Helms’ discharge, after her “protected complaints”, was circumstantial evidence of relation. See Decision at 21. The ALJ completely missed the fact that the timing actually falls in favor of Respondent. The very next time Robin Helms came into work after Respondent indisputably received reports about racist behavior in regard to her and that she was partially at fault for Ms. Heyward leaving, Ms. Helms’ separation from Respondent occurred. Rather than recognizing this far more persuasive timing, the ALJ concludes that the “complaints” Robin Helms made sometime in March or April must have been the reason rather than the incident that directly preceded it. Under this logic, Respondent must have simply been waiting around after the “complaints” to receive word regarding the incident with Ms. Helms and Ms. Heyward and it was then that they decided to strike. Much like the ALJ’s other conclusions, this makes no sense whatsoever, especially when one combines this with the fact that it is undisputed that Robin Helms’ was still receiving the “preferred shifts” she desperately wanted up until her termination even after her alleged “complaints.”

In contrast to the ALJ’s mistaken assertion that there is no credible evidence that Robin Helms was told about the issues leading to her discharge, as shown above, all of the evidence suggests that unless you believe Robin Helms entirely and disbelieve everyone else, which for reasons stated previously, there is no reason to do. Eugene and Angie Mitchell both testified that Robin Helms agreed she was burnt out and there was no reason to discuss those issues. See, e.g., (Tr. at 353:17-21; 353:19-24). This is another example the ALJ deciding based not on the

facts but based on his unjustified devotion to the word of Robin Helms. In any event, the case cited by the ALJ does not stand for proposition he cites it for. In that case, the employer admitted that he never told anyone, including the employee, the issues claimed to be at the heart of the dismissal. See D & F Industries, 339 NLRB 618, 622 (2003). That is completely different from this case where it is undisputed that others were told about issues even if you were to believe that Robin Helms was not told (which she was anyway).

Furthermore, according to the testimony of the three people at the termination meeting other than Ms. Helms, Ms. Helms acknowledged that she failed to serve a patron and that she was not happy and burnt out. (Tr. at 291:1-11); (Tr. at 292:4-19); (Tr. at 271:23-272:9); (Tr. at 272:10-19); (Tr. at 272:20-25); (Tr. at 381:5-16). Mr. Mitchell, who is the ultimate decision-maker at Kelly's, determined that it was best to separate given these issues as noted above. It is notable that Mr. Mitchell, who is the owner of Kelly's, testified clearly that he never even considered any complaints Ms. Helms was making at the time of his decision. (Tr. at 293:4-16). Mrs. Mitchell and Mr. Henry, who is a neutral party, both testified consistently that Ms. Helms' termination had nothing to do with her "complaints" about shift scheduling. (Tr. at 381:5-16).

It is extremely notable here that the ALJ's determination to credit the version of events given by Robin Helms in this meeting is steadfastly against the weight of the evidence. The simple fact is that four people were involved in that meeting in some fashion and only Robin Helms told the story she told. Mr. and Mrs. Mitchell and Ryan Henry, who no longer works for Respondent, testified consistently with Respondent's assertions in the case. The ALJ completely fails to explain, other than vague and flimsy statements about demeanor, why Robin Helms' word is so sacrosanct as to overcome the testimony of everyone else.



In addition, all witnesses for Respondent testified about Ms. Helms' negative attitude and how it was affecting other employees. Mrs. Mitchell confirmed that this was another reason why the Mitchells felt the need to meet with Ms. Helms about her issues. (Tr. at 290:12-25). Chelsea Heyward also confirmed that she felt Robin Helms' negative attitude was affecting the working environment. See, e.g., (Tr. at 199:1-17) (Ms. Heyward testifying that upon Ms. Helms leaving "all the negativity was gone and it completely changed into an environment where I actually mentioned to the people who were working with me if it had initially been that kind of environment that I wouldn't have left"). The persons that worked with Robin who testified also described the difficulty in working with her. As noted above, Mr. Stedeford had contact with Ms. Helms when he worked at Respondent's facility and found her "difficult to work with" and "always seemed to be an issue of not getting the appropriate shifts that she deemed appropriate." (Tr. 369:22-370:3). Mr. Bevevino also testified about Robin Helms' attitude toward working "crappy shifts," which everyone needed to do. (Tr. 359:6-360:6).

Certainly Respondent is entitled to address a negative attitude of an employee if it is affecting others. Copper River of Boiling Springs, LLC, 360 NLRB No. 60, 13-14 (2014) (affirming decision to discharge employee for displaying a "negative attitude" that was disruptive or had a negative impact as not violative of the Act). The ALJ cites a portion of Respondent's handbook that gives the right to discipline "criticizing, condemning, or complaining in a manner that affects employee morale." See Decision at n. 11. However, there is nothing improper about Respondent taking action regarding negativity of employees that is affecting morale of other employees. The ALJ entirely sidesteps the testimony about Robin Helms' negative attitude, simply acts as if it does not exist, and makes no effort to justify this omission.

The ALJ attempts to insinuate that the treatment of Sarah Clark was somehow inconsistent in terms of discipline and that the Mitchells failed to follow their “protocol.” See Decision 22. According to the ALJ, the Mitchells should have given Robin Helms the ability to explain herself as they did with Sarah Clark. See id. What the ALJ completely fails to comprehend is that the Sarah Clark incident actually supports Respondent’s position and not Ms. Helms.

First and foremost, the Respondent **did** give Robin Helms a chance to explain herself as Angie Mitchell testified that this was the purpose of the meeting in which Robin Helms was separated. (Tr. at 269:24-270:14) (“I wanted to talk to Robin Helms and find out her side of the story without putting other people under the bus”); (Tr. at 274:1-13). The ALJ completely fails to realize that this actually supports Mrs. Mitchell’s version of events. If the practice was to give employees a chance to explain themselves as the ALJ seemed to find, then it would make sense that the Mitchells would schedule a meeting with Ms. Helms to discuss the matter and get her version of events. That is exactly what they did according to the Mitchells and the only reason to find that Ms. Helms was not given an opportunity is due to the ALJ’s unwarranted dedication to Robin Helms’ testimony. The ALJ finds that the Mitchells did not give Ms. Helms an opportunity to explain as they did with Sarah Clark and this points to discriminatory motives. In doing so, the ALJ missed the true and far more logical conclusion that the fact that the Mitchells previously gave employees the opportunity to explain themselves suggest heavily that the Mitchells version of the April 30, 2015 meeting, in which they did just that, is actually the truth.

The evidence regarding Sarah Clark actually cuts against Ms. Helms claims in yet another important respect that is entirely ignored by the ALJ. Sarah Clark was one of the individuals Ms. Helms mentioned as also registering complaints about shift schedules. (Tr. at



57:5-25). However, the evidence showed that Sarah Clark left voluntarily after her graduation from Villanova University. (Tr. at 286:10-16). Mr. Mitchell testified that the issue was addressed as Ms. Clark was reprimanded and Ms. Clark acknowledged the issue, was contrite, and said that the patron was intoxicated. (Tr. at 317:9-11; 323:10-25).

If Respondent was looking to get rid of people complaining about shift schedules, why would Respondent not target the employee with a previous disciplinary issue? It makes no sense whatsoever that the Mitchells would fire Robin Helms only when there was another employee allegedly registering similar complaints that previous disciplinary issues. That is unless one accepts the actual truth of the matter which is that Robin Helms' termination had absolutely nothing to do with protected activity, if there even was any. The ALJ entirely fails to credit this important and undeniable point.

This entire issue regarding Sarah Clark illustrates, yet again, how much the ALJ had to twist the evidence to find for Robin Helms. The ALJ cites a case stating that failure to fairly investigate a matter can be a factor in finding discriminatory motive. The case cited by ALJ found that a sufficient investigation was made by calling the employee in to discuss the matter. See Publishers Printing Co., 317 NLRB 933, 938 (1995). That is precisely what happened here except that the ALJ believed everything Robin Helms said no matter how silly or contradicted. The ALJ essentially found "I find that the meeting did not give Ms. Helms an opportunity to explain even though that is what everyone else involved is saying except the one person with the most reason to lie and even though that is a departure from prior practice and, I'm going to hold that departure from prior practice that I've unjustifiably found against you as well, even though it does not make sense that you would do that." One can easily see why this decision is disheartening and upsetting.

It is also extremely noteworthy that Ms. Helms makes the assertion that she was fired for complaining about shift schedules and she specifically references going to management with fellow employee Kris Flood. The ALJ, of course, found this credible. Even assuming that Ms. Flood was making similar complaints and joining Robin Helms as she said she was, it still **does not** support Ms. Helms' case. It is important to note again here that General Counsel could have called Kris Flood to support this but did not.

Nonetheless, the undisputed evidence shows that not only does Ms. Flood still work for Respondent, but that she has been promoted since Ms. Helms' termination. (Tr. at 261:10-15). If the complaints about shift scheduling were the spark that caused retaliation against Ms. Helms, it absolutely does not make sense that Ms. Flood did not suffer the same fate, much less rising in the company hierarchy. This is obviously so because Ms. Helms' complaints, such as they were, were definitively not the reason that she no longer works for Respondent.

As with everything else that supports Respondent's case, the ALJ completely ignores this absolutely crucial evidence despite mentioning Ms. Flood several times. This point is critical however. Ms. Helms' story that "complaints about shift schedules" were her downfall is completely and totally undermined by this fact **even if you believe her**. That is because if her and Kris Flood were approaching management together and it was the aim of Respondent to squash that kind of conduct, then why on earth would they allow Robin Helms' compatriot to stick around and not only that, but promote her and give her more responsibilities. The answer is clear and absolutely undeniable, if Respondent's motive was truly about punishing protected activity, then Ms. Flood would have been fired, or at least disciplined, as well. The fact that she has not been proves, beyond any doubt, that Respondent was not targeting "complaining about shift schedules." Essentially, it is exactly as the person who made the decision to terminate Ms.



Helms said in that it had absolutely nothing to with complaints, protected or otherwise. (Tr. at 171:21-172:1).

### **CONCLUSION**

The process in the matter *sub judice* was flawed from the moment the Complaint, in its scarce form, was drafted. Respondent, adhering to the rules of Court, did everything in their power to bring this to the Court's attention, filing motions and repeatedly raising this fact in conferences with the Court. Despite General Counsel's assurances to the contrary, Respondent ended up exactly where they feared they would be, jackpotted at trial. The Decision of the ALJ was, likewise, flawed. The decision overturned or ignored clear evidentiary rulings made at trial and, in a departure from the ALJ's duties, did not fairly or dispassionately evaluate the evidence. Rather, in the face of the Third Circuit's cautioning in the *dicta* of MCPc, simply took the word of Ms. Helms as the absolute truth, without even a cursory evaluation of the overwhelming evidence against such a finding. The ALJ findings tortured the boundaries of credibility assessment in order to find for Ms. Helms. Despite all this, General Counsel was still unable to, and the Decision fails to, articulate that any concerted activity took place, let alone the conclusion that Ms. Helms' was terminated for it.

Case law and justice do not support the actions of General Counsel nor the Decision in this matter. As such, the Decision in this matter should be reversed for the reasons stated herein.

CONWAY SCHADLER

By: /s/ Nathan J. Schadler  
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Attorneys for Respondent



UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MID-ATLANTIC RESTAURANT GROUP  
LLC d/b/a KELLY'S TAP ROOM

and

Case 04-CA-162385

ROBIN C. HELMS, an Individual

**REQUEST FOR ORAL ARGUMENT**

Respondent hereby requests oral argument regarding its exceptions filed in the above-captioned matter pursuant to Rule 102.46(i).

CONWAY SCHADLER

By: /s/ Nathan J. Schadler  
Kent E. Conway, Esquire  
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UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

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Telephone: (215)597-7601  
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July 21, 2016

Gary W. Shinnars, Executive Secretary  
National Labor Relations Board  
1015 Half St., S.E.  
Washington, D.C. 20570-0001  
(e-filed)

Re: Mid-Atlantic Restaurant Group LLC d/b/a  
Kelly's Taproom  
Case 04-CA-162385

Dear Mr. Shinnars:

This is a request for a four-day extension of time for filing an Answering Brief in response to Respondent's exceptions and an Opposition to Respondent's Request for Oral Argument in the above matter from July 25, 2016 to July 29, 2016. Nathan J. Schadler (Counsel for Respondent) has no objection. I was unable to reach Robin C. Helms (Charging Party) by telephone or by e-mail message today. The extension of time is necessary because of my heavy caseload and my absence from work due to being on vacation from July 8, 2016 through July 14, 2016.

A copy of this request has been e-mailed on this date to Mr. Schadler and Mrs. Helms.

Very truly yours,

A handwritten signature in cursive script that reads "David Faye".

DAVID FAYE  
Counsel for the General Counsel  
(215) 597-7654

cc:

Nathan J. Schadler, Esq., Conway Schadler, LLC, 1795 W. Township Line Rd., Blue Bell, PA  
19422 ([Nathan@ConwaySchadler.com](mailto:Nathan@ConwaySchadler.com))  
Robin C. Helms, 72 N. Sycamore Ave., Clifton Heights, PA 19018 ([RobinCatt@yahoo.com](mailto:RobinCatt@yahoo.com))





United States Government

OFFICE OF THE EXECUTIVE SECRETARY  
NATIONAL LABOR RELATIONS BOARD  
1015 HALF STREET SE  
WASHINGTON, DC 20570

July 22, 2016

Re: Mid-Atlantic Restaurant Group-Kelly's Taproom  
Case 04-CA-162385

### EXTENSION OF TIME TO FILE ANSWERING BRIEF

The request for extension of time in the above-referenced case is granted.<sup>1</sup> The due date for the receipt in Washington, D.C. of Answering Brief to Exceptions is extended to **July 29 , 2016**. This extension applies to all parties.

/s/ Roxanne L. Rothschild  
Deputy Executive Secretary

cc: Parties

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<sup>1</sup> Please note that the NLRB's Rules and Regulations Section 102.111(b) states that "[r]equests for extensions of time filed within three days of the due date must be grounded upon circumstances not reasonably foreseeable in advance." The due date for answering briefs to exceptions was July 25, 2016 and the request for an extension was filed on July 21, 2016, which is only two business days prior to the document's due date. Despite being filed within three days of the due date, the request for extension of time did not set forth why the need for the extension was "not reasonably foreseeable." However, given that the amount of time requested for the extension of time is modest, we will allow the extension.



**UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD**

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July 29, 2016

Gary W. Shinnars, Executive  
Secretary  
National Labor Relations Board  
1015 Half St., S.E.  
Washington, D.C. 20570-0001  
(e-filed)

Re: Mid-Atlantic Restaurant Group LLC d/b/a  
Kelly's Taproom  
Case 04-CA-162385

Dear Mr. Shinnars:

Attached please find Counsel for the General Counsel's Answering Brief in response to Respondent's exceptions, Motion to Strike Portions of Respondent's Brief in Support of its Exceptions, and Opposition to Respondent's Request for Oral Argument in the above matter.

Copies of this Answering Brief, Motion, and Opposition have this day been served on the persons below by e-mail.

Very truly yours,

A handwritten signature in cursive script that reads "David Faye".

DAVID FAYE  
Counsel for the General Counsel  
e-mail address: [David.Faye@NLRB.gov](mailto:David.Faye@NLRB.gov)

cc:

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Ms. Robin C. Helms, 72 N. Sycamore Ave., Clifton Heights; PA 19018 ([RobinCatt@yahoo.com](mailto:RobinCatt@yahoo.com))



**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MID-ATLANTIC RESTAURANT GROUP LLC  
D/B/A KELLY'S TAPROOM

and

Case 04-CA-162385

ROBIN C. HELMS, an Individual

**ANSWERING BRIEF IN RESPONSE TO RESPONDENT'S EXCEPTIONS**

On July 11, 2016, Respondent Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom filed Exceptions to the Decision of Administrative Law Judge Mark Carissimi (herein called the ALJ) on June 13, 2016. Counsel for the General Counsel urges the Board to affirm the ALJ's rulings, findings, and conclusions in their entirety, adopt the recommended Order, and reject all of Respondent's Exceptions (1 through 18).

At the hearing, Counsel for the General Counsel presented background evidence concerning a former statutory supervisor not named in the Complaint and events outside the time period covered by the Complaint – and nothing prohibits Counsel from having done so and the ALJ from having considered it. Accordingly, the Board must reject Exceptions 1 and 2.

In Exceptions 3 and 4, Respondent excepts to various of the ALJ's credibility determinations. The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F. 2d 362 (3<sup>rd</sup> Cir. 1951). A careful examination of the record reveals no basis for reversing the ALJ's findings. Accordingly, the Board must reject Exceptions 3 and 4.

Just like Respondent's unfounded personal attacks on Counsel for the General Counsel, Respondent has made groundless attacks on the ALJ, contending in its brief that he was unfair and not impartial. A careful examination of the entire record, including the ALJ's Decision, is convincing that the ALJ's conduct did not constitute legal prejudice or even the appearance of partisanship. Indeed, the ALJ offered, in order to be fair to Respondent, to give its Counsel reasonable time to gather evidence, find a witness, and present a defense to Counsel for the General's position that an individual not named in the Complaint was a supervisor within the meaning of the Act if he wished to contest that position, as well as to prepare to meet the issues raised by the contention and to rebut these allegations, and he appreciated the ALJ's "courtesy" and the ALJ being "most gracious" in his handling of the matter. (TR. 36, 40-41, 47-51) There is no evidence that the ALJ was biased or prejudiced. *First Western Building Services, Inc.*, 309 NLRB 591, 591 fn. 1 (1992). Further, the Board is reluctant to hold that an ALJ was partial or created the appearance of partiality merely because the ALJ resolved all issues against a respondent, and a close review of the record here fails to establish that the ALJ pre-judged any issue. *Control Services, Inc.*, 315 NLRB 431, 432 (1994).

The ALJ issued a well-reasoned Decision and the record contains ample testimony supporting his findings and conclusions. Accordingly, the Board must reject Exceptions 5 through 18.

Respectfully submitted,

/s/ *David Faye*

Dated: July 29, 2016

DAVID FAYE  
Counsel for the General Counsel  
National Labor Relations Board



UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MID-ATLANTIC RESTAURANT GROUP LLC D/B/A  
KELLY'S TAPROOM

and

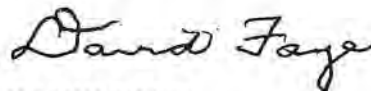
Case 04-CA-162385

ROBIN C. HELMS, an Individual

**MOTION TO STRIKE PORTIONS OF  
RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS**

On July 11, 2016, Respondent Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom filed a Brief in Support of its Exceptions. Counsel for the General Counsel moves to strike the portions of Respondent's brief discussing the alleged subject matter of the parties' pre-hearing conference calls with an Administrative Law Judge, which is outside the record and should not be considered. The content of these pre-hearing telephone conversations is not part of the record and is not properly the subject for argument in Respondent's brief. Accordingly, all references to, and arguments based on, these pre-hearing telephone conversations should be stricken from Respondent's brief. *S. Freedman Electric, Inc.*, 256 NLRB 432, 432 fn. 1 (1981); *Otis Elevator Co.*, 255 NLRB 235, 239-40 (1981); *Southern Florida Hotel & Motel Ass'n*, 245 NLRB 561, 561 fn. 6 (1979); also see *Local 933, UAW (Allison Gas Turbine)*, 307 NLRB 1065, 1065 fn. 1 (1992).

Respectfully submitted,



DAVID FAYE  
Counsel for the General Counsel  
National Labor Relations Board

Dated: July 29, 2016

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MID-ATLANTIC RESTAURANT GROUP LLC D/B/A  
KELLY'S TAPROOM

and

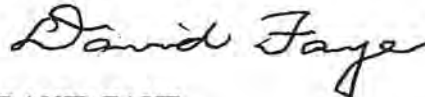
Case 04-CA-162385

ROBIN C. HELMS, an Individual

**OPPOSITION TO RESPONDENT'S REQUEST FOR ORAL ARGUMENT**

On July 11, 2016, Respondent Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom filed a Request for Oral Argument. Counsel for the General Counsel opposes the Request. The Request should be denied because the record, Respondent's exceptions, and briefs adequately present the issues and the positions of the parties. *Local 933, UAW (Allison Gas Turbine)*, 307 NLRB 1065, 1065 fn. 1 (1992).

Respectfully submitted,



DAVID FAYE  
Counsel for the General Counsel  
National Labor Relations Board

Dated: July 29, 2016



UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MID-ATLANTIC RESTAURANT GROUP  
LLC d/b/a KELLY'S TAP ROOM

and

Case 04-CA-162385

ROBIN C. HELMS, an Individual

**MID-ATLANTIC RESTAURANT GROUP LLC DBA KELLY'S TAP ROOM'S BRIEF  
IN SUPPORT OF ITS EXCEPTIONS & RESPONSE TO MOTION TO STRIKE**

Respondent files a Reply Brief in this matter not so much to specifically respond to the assertions in General Counsel's Brief, but rather to point out the utter lack of any meaningful argument or support offered by General Counsel. Respondent presented 50 pages of thoughtful analysis, legal authority, and copious cites to the actual record demonstrating that the decision of the ALJ in this matter was biased and entirely contrary to the facts and prevailing law. General Counsel responds to this with a brief, barely a page and a half in length, with no evidence, no relevant citations, and no substantive response whatsoever.

In fact, Respondent wishes to point out specifically that Respondent has made strong argument that there was no concerted activity in this matter and could not be given the facts of this matter. Respondent's Brief at 34-40. General Counsel, as it did in its Post-Trial Brief, fails to make **any** argument that there is "concerted activity" in this case. As such, the Board should note that Respondent's powerful arguments on concerted activity have never been opposed by General Counsel in any way and are uncontested.

General Counsel also cites to the record in its Brief in a way that entirely fails comprehend the serious issues raised by Respondent. General Counsel chides Respondent's Counsel for being appreciative of the ALJ's ruling that items prior to the time periods in the Complaint would not be considered. See General Counsel's Brief at 2. This is not only a

mischaracterization of the record but it was prior to the ALJ ruling the pre-complaint materials would not be considered and then ignoring that ruling entirely in the ALJ's decision. The circumstance of the ALJ making a ruling and then entirely ignoring it, highlights the extreme prejudice suffered by Respondent.

Furthermore, General Counsel notes that while ALJ said there would be an opportunity to meet evidence if necessary, General Counsel overlooks that the ALJ's ruling that pre-complaint matters would not be considered made any such evidence unnecessary. The only thing that made such evidence necessary is when the ALJ reversed course and spent half of the decision considering the very things that were not to be considered. That is why there was such heavy prejudice to Respondent and it is far more important than a few stray remarks from Respondent's Counsel taken out of context.

General Counsel has also made a motion to strike mentions to pre-hearing materials. This is not only absurd and wholly inaccurate, but again fails to appreciate the position Respondent was put in. Respondent repeatedly requested more information and General Counsel repeatedly made every attempt to be as obtuse and secretive about its actual case as possible. If General Counsel had been honest about the fact that it may bring up matters well outside the Complaint's time periods and managers that have not been mentioned before, Respondent would have acted appropriately. As a result, the actions of General Counsel in this regard are part and parcel to Respondent's assertions regarding the fairness of the process and are vitally important to understand what occurred. This is in addition to the fact that these issues were brought up at the hearing and **are** on the record, making General Counsel's statement completely inaccurate. See, e.g., (Tr. at 46:5-49:14).



Perhaps most telling of all is that General Counsel has opposed Respondent's request for oral argument in this matter. General Counsel has done so because "the record, Respondent's exceptions, and briefs adequately present the issues and the positions of the parties." See General Counsel's Opposition to Respondent's Request for Oral Argument. If that is in fact the case, then the Board should simply issue a decision in Respondent's favor immediately because General Counsel's "brief" has entirely failed to address any issues at all. Respondent deserves far better and at least deserves to be heard.

The Government's "response" is horridly troubling to Respondent and serves to shine a glaring spotlight on the lack of effort, thought and time that General Counsel has put into this case. Furthermore, General Counsel's filing is exceedingly disrespectful to the NLRB, and the fairness that it seeks to guarantee to litigants whom come before it.

Respondents, small business owners, have spent significant resources trying to fight these unfounded charges. They have stretched themselves thin financially in doing so. They have played by the rules, come prepared for Court and filed complete, well thought out motions and briefs in an effort to both seek justice and show the NLRB the respect it deserves. Sadly, the Government has not shown a shred of respect to the Respondent, nor the NLRB, and their most recent filing is a prime example.

The Government has made the decision to wield its awesome power against two if its citizens and their local, small town business. Rather than appreciate that power, they have treated the process in what can only be described as an absurdly flippant manner from the beginning. From filing a complaint that misrepresented the time period in question to leaving out important witnesses, to the lack of witnesses and evidence presented at the hearing, to the most recent: their woefully inadequate reply to Respondent's Brief and Exceptions. Their reply,

done in response to a lengthy brief raising significant issues of fairness and fact, replete with citations to the record as well as cases and extensive analysis of the same, the Government, with its teams of lawyers and request for extension of time, put forth a response that fails to address a multitude of issues, twists the record and lacks any semblance of a legal argument. This lack of effort and care is a grave disrespect to the Respondents in this matter, as well as the NLRB.

General Counsel's filing demonstrates one of two things to the NLRB, neither of which is appropriate. At best, the Government did not put the effort into researching and crafting an argument, rather leaves both to NLRB to do on its behalf. At worst, it is treating the matter like the NLRB is biased, the Government has already won and, as such, sees no need to expend time and effort into the matter, as they know the result. Neither apathy nor the belief that the system is rigged in their favor is an appropriate attitude to bring before a Court or Administrative Agency.

CONWAY SCHADLER

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BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

MID-ATLANTIC RESTAURANT GROUP  
LLC d/b/a KELLY'S TAPROOM,

Respondent,

And

ROBIN C. HELMS, An Individual,

Charging Party.

Case No. 04-CA-162385

The above-entitled matter came on for hearing pursuant to Notice, before THE HONORABLE MARK CARISSIMI, Administrative Law Judge, at the National Labor Relations Board, 615 Chestnut Street, Courtroom 5, Philadelphia, Pennsylvania, 19106, on Wednesday, March 23, 2016, at 10:00 a.m.

BURKE COURT REPORTING, LLC  
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A P P E A R A N C E S

1 On behalf of the General Counsel:

2

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9 On behalf of the Respondent:

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1		<u>I N D E X</u>				
2						
3						VOIR
4	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>DIRE</u>
5						
6	Robin C. Helms	15	91	142	--	--
7						
8	Eugene Mitchell	157	170	172	172	--
9						
10	Angelia Mitchell	174	179	--	--	--
11						
12	Chelsea Heyward	182	200	236	--	--
13						

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	<u>E</u> <u>X</u> <u>H</u> <u>I</u> <u>B</u> <u>I</u> <u>T</u> <u>S</u>	
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2		
3	General Counsel's	
4	GC-1	6
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1    P R O C E E D I N G S

2 (Time Noted: 10:12 a.m.)

3 JUDGE CARISSIMI: On the record.

4 The hearing will be in order. This is a formal trial  
5 before the National Labor Relations Board in Mid-Atlantic  
6 Restaurant Group LLC, d/b/a Kelly's Taproom, Case 04-CA-162385.  
7 The administrative law judge presiding is Mark Carissimi. I'm  
8 assigned to the Washington, DC, Office of Judges. Any  
9 communication should be addressed to that office. Any requests  
10 for extensions of time should be addressed to the Chief  
11 Administrative Law Judge in Washington, DC.

12 Will counsel and other representatives of the parties  
13 please state their appearances for the record? First, for the  
14 general counsel?

15 MR. FAYE: Thank you. David Faye, F-A-Y-E, National Labor  
16 Relations Board, Region 4, 615 Chestnut Street, Suite 710,  
17 Philadelphia, Pennsylvania, 19106-4413.

18 JUDGE CARISSIMI: And for the Respondent?

19 MR. SCHADLER: Good morning, Your Honor. Nathan Schadler,  
20 Conway Schadler, LLC. Our address is 3245 Ridge Pike,  
21 Eagleville, PA, 19403.

22 JUDGE CARISSIMI: Thank you. I know that there have been  
23 some settlement discussions between the parties. The case  
24 hasn't settled, but I will tell you that if there is any desire  
25 to revisit that issue during this hearing to let me know and I

1 will give you a reasonable recess to do that.

2 At this time, Mr. Faye, I'd like you to move to introduce  
3 the formal papers in this case.

4 MR. FAYE: I'd move that General Counsel Exhibit 1, which  
5 constitutes the formal papers, now that I have shown them  
6 before the hearing began to Respondent's counsel, so I  
7 therefore request that they be moved into evidence.

8 (General Counsel's GC-1 identified.)

9 JUDGE CARISSIMI: That is General Counsel Exhibit 1,  
10 correct?

11 MR. FAYE: That's right, Your Honor.

12 JUDGE CARISSIMI: Is there any objection to General  
13 Counsel Exhibit 1?

14 MR. SCHADLER: There is no objection, Your Honor. I've  
15 had the opportunity to review them at today's hearing and I'd  
16 seen them prior, Your Honor, through the course of the matter.

17 JUDGE CARISSIMI: Thank you. General Counsel Exhibit 1 is  
18 admitted.

19 (General Counsel's GC-1 received.)

20 JUDGE CARISSIMI: Are there any preliminary motions to be  
21 made first by the General Counsel?

22 MR. FAYE: The one motion, Your Honor, is I would move to  
23 sequester witnesses.

24 JUDGE CARISSIMI: It's the Board's policy that if a motion  
25 to sequester is made that I must grant it and I will do so in



1 this case. A sequestration order is being issued in this  
2 proceeding. This means that all persons who expect to be  
3 called as witnesses in this proceeding other than a person  
4 designated as essential to the presentation of a party's case  
5 will be required to remain outside the courtroom whenever  
6 testimony or the proceedings are taking place.

7 A limited exception applies to witnesses who are alleged  
8 discriminatees in this matter. They may be present in the  
9 courtroom at all times other than when witnesses for the  
10 General Counsel or Charging Party are giving testimony about  
11 the same events about which the alleged discriminatee is  
12 expected to testify.

13 The sequestration order also prohibits all witnesses from  
14 discussing with any other witness or any possible witness the  
15 testimony he or she has already given or will give. Likewise,  
16 counsel for a party may not disclose to any witness the  
17 testimony of any other witness. Counsel may, however, inform  
18 his or her own witness of the content of testimony given by an  
19 opposing party's witness in order to prepare to rebut that  
20 witness' testimony.

21 It is the responsibility of counsel to see that they and  
22 their witnesses comply with the sequestration rule.

23 Does the General Counsel wish to designate a  
24 representative that can remain throughout the hearing even if  
25 called as a witness?

1 MR. FAYE: Your Honor, the Charging Party, who is my  
2 representative.

3 JUDGE CARISSIMI: The Charging Party is an individual and  
4 as a party has a right to remain throughout the hearing. So  
5 Ms. Helms will be the GC representative but as I indicated she  
6 is a party to the case.

7 For the Respondent?

8 MR. SCHADLER: Yes, Your Honor. We have two individuals  
9 in the courtroom, Gene and Angie Mitchell, who are named in the  
10 matter as well.

11 JUDGE CARISSIMI: Yes.

12 MR. SCHADLER: I'd request their permission to stay. We  
13 have also stated that an individual named Mr. Hargraves, who is  
14 a current manager at Kelly's, has absolutely no -- any kind of  
15 relevant information, was not there at the time or any relevant  
16 proceedings. He is here just simply to witness the  
17 proceedings. He will be here around 11 o'clock. He is  
18 somebody that we will not call. We have no purpose to call  
19 him, has no relevant information.

20 JUDGE CARISSIMI: Other than witnesses, it's a public  
21 hearing so anybody else is welcome to remain through the  
22 hearing. But you are only entitled to one representative.

23 MR. SCHADLER: I know, Your Honor, so I'm going to have to  
24 have that conversation right now.

25 JUDGE CARISSIMI: Do you want to go off the record to do



1 that?

2 MR. SCHADLER: Yes, if I may, Your Honor.

3 JUDGE CARISSIMI: Off the record.

4 (Off the record.)

5 JUDGE CARISSIMI: Mr. Schadler, have you made a decision  
6 about who you wish to designate as your representative?

7 MR. SCHADLER: Yes, Your Honor, designate Angie Mitchell.

8 JUDGE CARISSIMI: Ms. Mitchell, you can remain throughout  
9 the hearing even if called as a witness.

10 Also, we discussed, both parties are in agreement and it's  
11 my practice unless the parties feel otherwise that the  
12 sequestration order will go into effect after opening  
13 statements and prior to the calling of the first witness. In  
14 other words, everybody can remain in the hearing room for  
15 opening statements.

16 Now I understand there's also some preliminary issues with  
17 regard to the complaint and some of the substantive allegations  
18 in the complaint. Mr. Faye, is there any amendment to the  
19 complaint that the General Counsel is going to make at this  
20 time?

21 MR. FAYE: Yes, Your Honor. First, we're asking for  
22 confirmation from Respondent for typographical reasons of the  
23 name. I'm told that Kelly's Taproom that actually the word  
24 Taproom should be -- is one word and therefore we have a name  
25 that is slightly off here for the Respondent. If that is

1 indeed the case, which I understand, I would request that all  
2 the formal papers be amended to reflect the legal name of the  
3 Employer, that the last word should be Taproom as one word, not  
4 two.

5 JUDGE CARISSIMI: Mr. Schadler?

6 MR. SCHADLER: No objection to that, Your Honor. We would  
7 make no issue of any typos that weren't corrected as it  
8 pertains to the name of the business. We certainly acknowledge  
9 we're here and we're the appropriate entity.

10 JUDGE CARISSIMI: For my decision, it will have the word  
11 Taproom. Frankly, I wondered about that when I looked at the  
12 pleadings. In my view, it always was one word, but I can  
13 always be corrected. So now we know and that's the manner in  
14 which I will refer to the Respondent.

15 Is there anything further?

16 MR. FAYE: Yes, Your Honor. Counsel and I have previously  
17 spoken about Paragraph 3 in the complaint. My understanding is  
18 Respondent, at this time, is willing to enter into a  
19 stipulation that Eugene Mitchell, Angelia Mitchell, and Ryan  
20 Henry are supervisors of Respondent within the meaning of  
21 Section 2(11) of the Act and agents of Respondent within the  
22 meaning of Section 2(13) of the Act. I understood that this  
23 could be accomplished either by stipulation or an amended  
24 answer.

25 JUDGE CARISSIMI: That is true. Mr. Schadler, do you



1 stipulate that Eugene Mitchell, Angelia Mitchell, and Ryan  
2 Henry are supervisors within the meaning of 2(11) and agents  
3 within the meaning of Section 2(13)?

4 MR. SCHADLER: Yes, we do. For purposes of this hearing  
5 we do stipulate to that fact.

6 JUDGE CARISSIMI: Very good. I will accept the  
7 stipulation.

8 MR. FAYE: Thank you.

9 JUDGE CARISSIMI: Mr. Faye, is there anything further  
10 before your opening statement?

11 MR. FAYE: Yes. On Paragraph 4(a), Your Honor, I  
12 indicated to Respondent's counsel previously that I'm moving to  
13 amend to delete the words "and the loss of pay resulting from  
14 the malfunctioning of Respondent's computer system," in other  
15 words the last portion of 4(a).

16 JUDGE CARISSIMI: As I understand your statement,  
17 Paragraph 4 is amended to end after the word "schedules," is  
18 that correct?

19 MR. FAYE: Correct.

20 JUDGE CARISSIMI: Is there any opposition to that proposed  
21 amendment, Mr. Schadler?

22 MR. SCHADLER: No, Your Honor. Just so it's clear for the  
23 record then 4(a) would read as follows, "In March and April,  
24 2015, Respondent's employees, including Robin C. Helms, openly  
25 complained about shift schedules."

1 JUDGE CARISSIMI: Mr. Faye, in agreement?

2 MR. FAYE: Yes, I am, Your Honor.

3 JUDGE CARISSIMI: Very good. I will grant the amendment  
4 to the complaint.

5 MR. FAYE: Your Honor, as to Paragraph 1, which is as to  
6 the service of the charge, while Respondent has denied that the  
7 charges are valid, claiming there has not been any evidence to  
8 support the charge, frankly it would be my position that the  
9 charge is valid even if it was unsupported. The point of 1 is  
10 about the filing and the service, which is being admitted, and  
11 I was wondering whether or not at this time whether  
12 Respondent's counsel would strike the portion about -- the  
13 second sentence of his answer on Paragraph 1 as challenging the  
14 validity of the charge.

15 JUDGE CARISSIMI: Mr. Schadler?

16 MR. SCHADLER: Your Honor, first off we do challenge the  
17 validity of the charge and I would not --

18 JUDGE CARISSIMI: Well, the main thing is the filing and  
19 the service of the charge is admitted, and that's the operative  
20 fact. Off the record.

21 (Off the record.)

22 JUDGE CARISSIMI: On the record.

23 Mr. Faye, are you ready for an opening statement?

24 MR. FAYE: If I may, Your Honor, I just want to comment --

25 JUDGE CARISSIMI: Oh, you have something else?



1 MR. FAYE: Paragraph 2, I know that Respondent has denied  
2 Paragraph 2(c). I have never seen where it doesn't flow. If  
3 (a) and (b) are admitted, it doesn't flow to the legal  
4 conclusion of (c).

5 JUDGE CARISSIMI: (a) and (b) are the important ones so  
6 they're the facts. They're admitted. If (a) and (b) are  
7 admitted then I'm going to find that the Respondent is an  
8 Employer engaged in commerce within the meaning of the Act  
9 regardless of what the Respondent's answer says with respect to  
10 Paragraph C.

11 MR. FAYE: Thank you, Your Honor. With that I would be  
12 prepared to give a very brief opening statement.

13 JUDGE CARISSIMI: You may proceed, sir.

14 MR. FAYE: Your Honor, the evidence will show that the  
15 Employer unlawfully discharged the Charging Party, employee  
16 Robin Helms, because she engaged in protected concerted  
17 activity concerning complaints about shift schedules in  
18 violation of Section 8(a)(1) of the Act. The Employer had  
19 knowledge and animus.

20 Further, the PCA occurred shortly before the discharge  
21 thereby indicating strong timing. I respectfully urge Your  
22 Honor to find for the General Counsel. Thank you.

23 JUDGE CARISSIMI: Thank you. Mr. Schadler, do you wish to  
24 make an opening statement at this time?

25 MR. SCHADLER: Yes, Your Honor, just very briefly as well

1 because the issues in this case, Your Honor, you're going to  
2 see are very finite and very specific. The two issues that are  
3 going to come up in this trial from our perspective and what we  
4 will be arguing is that there is no concerted activity and nor  
5 is the discharge in this case remotely connected to any  
6 allegation of concerted activity.

7 Your Honor, there have been recent decisions handed down  
8 by the Third actually that are directly on point on these  
9 issues. I believe the testimony is going to very clearly state  
10 that what we are seeing here was an individual, the evidence  
11 will show, who was acting on her own behalf, not on behalf of  
12 any other employees as we will submit to the Court the  
13 concerted activity test.

14 Also, under the appropriate standards that are required to  
15 show for termination and that would be specifically, and I want  
16 to give the Court the cite because we will be using it as well.  
17 It would be the Wright Line test and that would be found at --  
18 Wright Line is actually cited in a case that we're going to be  
19 citing and it's more articulate to the point which is *MCPC*,  
20 2016 WL 559219. And that's going to be the discussion we're  
21 talking about, Your Honor. That will be the appropriate test  
22 we submit to the Court under which the Court should analyze  
23 this termination and we believe the government will come up  
24 woefully short on both prongs of this.

25 JUDGE CARISSIMI: Thank you.



1 MR. SCHADLER: Thank you, Your Honor. And, Your Honor,  
2 with that I believe with the conclusion of the opening  
3 statement, I will ask Mr. Gene Mitchell to step out of the  
4 room.

5 JUDGE CARISSIMI: Very good. Let's go off the record.  
6 (Off the record.)

7 JUDGE CARISSIMI: General Counsel, you may call your first  
8 witness.

9 MR. FAYE: Yes, Your Honor. I call Robin Catherine Helms.  
10 Catherine is spelled C-A-T-H-E-R-I-N-E.

11 JUDGE CARISSIMI: Ms. Helms, if you would please raise  
12 your right hand?  
13 (Whereupon,

14 ROBIN CATHERINE HELMS,  
15 was called as a witness by and on behalf of the General Counsel  
16 and, after having been duly sworn, was examined and testified  
17 as follows:)

18 JUDGE CARISSIMI: Please have a seat.

19 THE WITNESS: Thank you.

20 COURT REPORTER: Can you say and spell your name?

21 THE WITNESS: Sure. R-O-B-I-N, C, Helms, H-E-L-M-S.

22 DIRECT EXAMINATION

23 BY MR. FAYE:

24 Q Please state your name and address for the record.

25 A Robin C. Helms, 72 North Sycamore Avenue, Clifton Heights,

1 Pennsylvania.

2 Q And the zip code?

3 A 19018.

4 Q Were you employed at Kelly's Taproom?

5 A Yes, I was.

6 Q Where is the Employer located?

7 A Bryn Mawr, Pennsylvania, just next to Villanova.

8 Q Who makes up the bulk of the Employer's clientele?

9 A Villanova University students.

10 Q When were you hired?

11 A March 2014.

12 Q Are you still employed there?

13 A No, I'm not.

14 Q Why?

15 A I was fired for making complaints.

16 Q Please keep your voice up. When were you discharged?

17 A April 30th of 2015.

18 Q Before your discharge, what if any discipline like  
19 suspensions and written warnings did you ever receive from the  
20 Employer?

21 A None.

22 Q How would you describe your attendance record with the  
23 Employer?

24 A Perfect.

25 Q What is your highest level of education?



1 A I have a Master's of Arts degree.

2 Q What was your position with the Employer?

3 A Bartender.

4 Q Prior to being employed by the Employer, how long were you  
5 a bartender elsewhere?

6 A Off and on, for sixteen years.

7 Q Were you hired by the Employer as full-time or part-time?

8 A Part-time.

9 Q In April 2015, about how many hours did you work per week?

10 A 30 to almost 40.

11 Q When did you begin working this number of hours?

12 A April, late March, April.

13 Q 2015.

14 A 2015, yes.

15 Q In April 2015, what shifts were you working?

16 A They varied. Consistently, it should have been  
17 consistently Thursday, Friday, Saturday. Random, I helped out  
18 on picking up Sundays. Sometimes, it was Tuesdays and  
19 Wednesdays, also with varied hours those days.

20 Q Remember to keep up your voice, please. How if at all did  
21 this compare with the shifts you worked previously?

22 A It was significantly more hours but the amount of money  
23 for those less desired shifts wasn't equaling more take-home  
24 money.

25 Q What are the most lucrative shifts for a bartender?

- 1 A Thursday, Friday, Saturday with a 5 o'clock start time.
- 2 Q 5:00 p.m.?
- 3 A 5:00 p.m., correct.
- 4 Q What shifts did you desire to work?
- 5 A Those lucrative shifts.
- 6 Q How many bartenders were employed at Kelly's?
- 7 A Roughly eight, plus or minus.
- 8 Q Was Kelly's a union or nonunion facility?
- 9 A It was a nonunion facility.
- 10 Q Who scheduled the shifts at Kelly's?
- 11 A The manager scheduled the shifts and then they were
- 12 approved by Gene and Angie, Gene and/or Angie.
- 13 Q Mitchell?
- 14 A Correct.
- 15 Q How did the staff learn of the schedule?
- 16 A We would receive an email.
- 17 Q From?
- 18 A From Ryan, typically.
- 19 Q Ryan's last name?
- 20 A Ryan Henry.
- 21 Q Who is Ryan Henry?
- 22 A He was the manager there towards the end of my position.
- 23 Q When did the staff, in March and April 2015 usually get
- 24 the schedule?
- 25 A Saturday, usually evening.



1 Q The schedules were for the week beginning when?

2 A Monday, two days later.

3 Q What in your view was the general feeling of the  
4 bartenders during your employment with the scheduling process?

5 MR. SCHADLER: Objection, Your Honor. Calls for  
6 speculation.

7 JUDGE CARISSIMI: Sustained. Ms. Helms, let me explain  
8 the rules and you're doing well. There is a little pause  
9 between the question and the answer which gives the opposing  
10 counsel a chance to object. And if I say the objection is  
11 sustained that means I didn't like the question and the  
12 attorney has to ask another one.

13 THE WITNESS: Okay.

14 JUDGE CARISSIMI: If I say overruled that means the  
15 question is okay.

16 THE WITNESS: I was waiting for somebody to tell me what  
17 to do, thanks.

18 JUDGE CARISSIMI: Yeah. And then you can answer. Okay?

19 THE WITNESS: Okay.

20 BY MR. FAYE:

21 Q As to your state of mind, what was your viewpoint of your  
22 own scheduling of hours?

23 A Frustrated, very frustrated.

24 Q Why?

25 MR. SCHADLER: Objection, Your Honor.

1 JUDGE CARISSIMI: Basis?

2 MR. SCHADLER: I would have no problem if counsel asked  
3 the question what were her feelings, but just so the record  
4 reflect that she's articulating hers and not the feeling of  
5 anyone else.

6 MR. FAYE: I did ask what was your feeling.

7 JUDGE CARISSIMI: Right. The answer was not particularly  
8 responsive in that respect to counsel's question. So you  
9 understand the question, Mr. Faye is asking you about your own  
10 feelings. That's what this question is about.

11 THE WITNESS: Yes.

12 JUDGE CARISSIMI: All right, very good.

13 MR. SCHADLER: And I would move to strike any reference to  
14 "we."

15 JUDGE CARISSIMI: I'm not going to strike testimony, but  
16 I'm not going to consider the reference to, at this point,  
17 "we."

18 MR. SCHADLER: Thank you, Your Honor.

19 BY MR. FAYE:

20 Q What was your feeling?

21 A I was frustrated.

22 Q About what?

23 A About the inconsistency, the lack of knowledge of when I  
24 would be working in the next couple of days and what that  
25 schedule would look like.



1 Q What time frame was this frustration in comparison to the  
2 fact that you were discharged in 2015?

3 A Towards the very end of my stay with Kelly's, very much  
4 late March, April.

5 Q In late March and April of 2015?

6 A Correct.

7 Q How would you describe your feelings to this scheduling  
8 before that time frame?

9 A I was generally happy with it.

10 Q What in your view was management's feeling towards  
11 employees discussing working conditions?

12 A It was very much frowned upon.

13 MR. SCHADLER: Objection, Your Honor.

14 JUDGE CARISSIMI: I'm going to sustain the objection to  
15 that question. If there is anything specific that you want to  
16 bring out that's one thing, but I'm going to sustain the  
17 objection to that question.

18 BY MR. FAYE:

19 Q Who is Kris Flood?

20 A She was a co-worker of mine at Kelly's Taproom.

21 Q And this is Kris, K-R-I-S?

22 A Correct.

23 Q Was she part-time or full-time?

24 A When I started she was a full-time employee of  
25 Mid-Atlantic Restaurant Group, only part-time at Kelly's.

1 Q If you know, how did that come about?

2 A From Kris' perspective --

3 MR. SCHADLER: Objection, Your Honor.

4 JUDGE CARISSIMI: Well, if you're going to have a  
5 conversation, you know, perspectives, feelings, I mean what  
6 people said to you or what you said to them is what's relevant.

7 THE WITNESS: Okay.

8 JUDGE CARISSIMI: So if you could keep that in mind. Why  
9 don't you ask your question again, counsel.

10 BY MR. FAYE:

11 Q How did it come to be that, if you know, that Kris Flood  
12 came to be working at Kelly's with more hours?

13 A She told me that --

14 MR. SCHADLER: Objection, hearsay.

15 JUDGE CARISSIMI: Is Ms. Flood going to testify?

16 MR. FAYE: No.

17 JUDGE CARISSIMI: Well, then it's hearsay. I'm going to  
18 admit it. Hearsay is admissible in Board proceedings. The  
19 weight I attach to it will be the subject of argument.

20 MR. SCHADLER: Of course.

21 THE WITNESS: Do I continue?

22 JUDGE CARISSIMI: You can answer.

23 BY MR. FAYE:

24 Q Can you explain --

25 A Yes.



1 Q -- in your understanding how Kris Flood -- is it correct  
2 she had hours at Kelly's?

3 A Correct.

4 Q And what if any other hours did she have at another  
5 facility?

6 A She worked more full-time hours at the Ale House, Garrett  
7 Hill Ale House.

8 JUDGE CARISSIMI: Excuse me, Mr. Faye. How do you know  
9 that?

10 THE WITNESS: She told me that she did. She was only  
11 available to work at Kelly's on Fridays. That's when she  
12 worked there because she was otherwise at Garrett Hill Ale  
13 House.

14 JUDGE CARISSIMI: Do you recall when she told you that  
15 approximately?

16 THE WITNESS: Well, probably my first day. I knew that  
17 she worked at Kelly's only on Friday. She was there my very  
18 first night.

19 JUDGE CARISSIMI: Your first day of employment?

20 THE WITNESS: Yes.

21 JUDGE CARISSIMI: And that again was? I know you told me,  
22 but --

23 THE WITNESS: That was early March of 2014.

24 JUDGE CARISSIMI: Thank you.

25 THE WITNESS: I knew then that she worked at both places.

1 JUDGE CARISSIMI: All right.

2 THE WITNESS: Do I go back to answering the question?

3 MR. FAYE: Please.

4 THE WITNESS: I don't know what to do.

5 JUDGE CARISSIMI: Do you remember the question?

6 THE WITNESS: I do. I remember the question. Kris told  
7 me that she came to only work at Kelly's and no longer the Ale  
8 House because she made complaints about her schedule, about  
9 having to train her replacement and then her replacement taking  
10 her hours there, and she was disciplined by being moved over to  
11 Kelly's and no longer being allowed to work at the Ale House.

12 BY MR. FAYE:

13 Q What is the relationship of the Ale House that you  
14 referred to, to Kelly's?

15 A It is part of the Mid-Atlantic Restaurant Group.

16 Q What consists of the Mid-Atlantic Restaurant Group?

17 A It is Kelly's Taproom, Flip & Bailey's, and Garrett Hill  
18 Ale House.

19 Q The last two entities are located where?

20 A In Rosemont, Pennsylvania, just right down the road, which  
21 is also next to Villanova.

22 Q About two weeks before your discharge on April 30, 2015,  
23 did you have a conversation with Ryan Henry about your shift?

24 A Yes, I did.

25 Q Who again is Ryan Henry?



1 A He was the manager.

2 Q Where did the conversation take place?

3 A In his office downstairs.

4 Q Did you have a conversation with Ryan Henry in the service  
5 bar area?

6 A I did.

7 Q If I can address that conversation in the service bar area  
8 at Kelly's, what if anything did you say to Mr. Henry?

9 A That I was increasingly frustrated and I wanted to speak  
10 with the Mitchells, Gene and/or Angie, about the scheduling,  
11 that myself and my co-workers were feeling.

12 Q What if anything did you tell Mr. Henry regarding being a  
13 senior employee?

14 A That as we were getting closer to graduation and the prime  
15 shifts were becoming available, the increased business that was  
16 going to sustain us for the summer, I wanted to make sure that  
17 with new employees coming in that the senior employees weren't  
18 going to lose those shifts.

19 Q What did Mr. Henry reply?

20 A He told me not to make any complaints to Gene, that a  
21 dishwasher who was also the cleaner recently told Gene that he  
22 wasn't going to be available for the next few Saturdays, and  
23 Ryan was told to take him off of the cleaning schedule as a  
24 retribution for requesting off.

25 Q Who is Kristin Lang?

1 A She was one of my first managers when I was employed at  
2 Kelly's.

3 Q When did she stop being a manager?

4 A December 2014.

5 Q Did she leave the Employer at that time?

6 A She left to have a baby. She left on maternity leave and  
7 didn't come back.

8 Q This is Kristin, K-R-I-S-T-I-N?

9 A I don't really -- I can't really definitely tell you I  
10 know the spelling of her name.

11 Q Who if anyone replaced Kristin Lang as manager?

12 A Ryan Henry. They overlapped before she left because she  
13 was going on maternity leave.

14 Q In late November or early December 2014, what if anything  
15 does Ms. Lang tell you about complaining?

16 A That it was going to get her in trouble. That she  
17 couldn't handle that stress right now. And that --

18 Q What would get her in trouble, did she indicate?

19 A If I complained to Gene and Angie. I told her that I was  
20 frustrated with her mismanagement of the schedule and that if I  
21 complained to Gene and Angie or brought it up to them that she  
22 would then get in trouble, that she couldn't handle that  
23 stress, and all that would happen is she would be told to take  
24 shifts away from me.

25 JUDGE CARISSIMI: I'm going to interrupt for a second,

1 Mr. Faye. Ms. Lang is not alleged in the complaint, correct?

2 MR. FAYE: Correct. Her successor is.

3 JUDGE CARISSIMI: So the question I have is Mr. Schadler,  
4 do you stipulate that Ms. Lang is a supervisor within the  
5 meaning of the Act?

6 MR. SCHADLER: At this time, I cannot stipulate to that,  
7 Your Honor. This is the first I'm hearing about this. This is  
8 essentially I can't --

9 JUDGE CARISSIMI: Without a stipulation that's an issue.  
10 If you want to pursue that, counsel, you can, if you want to  
11 ask questions on supervisory status. But at this point, I want  
12 to make sure you understand that absent a stipulation, if your  
13 contention is that I should rely on her statements as  
14 admissions against Respondent, I'm going to need evidence as to  
15 what her status is.

16 BY MR. FAYE:

17 Q What if any difference was there between the duties and  
18 authority of Kristin Lang as manager versus the duties and  
19 authority of Ryan Henry?

20 A To my knowledge, the only difference was when Kristin  
21 started she had a little more authority than Ryan ever did.  
22 She was originally able to go into the system and change our  
23 time. So if someone forgot to clock out, she could go into the  
24 system and then make that adjustment for them to make it an  
25 earlier time rather than a later time. So if someone forgot to



1 clock out and it was noticed the next day, it's 11 o'clock in  
2 the morning when we open, someone is still clocked in, she  
3 could go back into the computer system and change their  
4 clock-out time, if it was a server to 10:00 p.m. the night  
5 before, a bartender, 2:00 a.m. in the morning. And that was  
6 later something that was taken away from her as ability to do  
7 it in the computer system, but Ryan was never able to do it to  
8 my knowledge.

9 Q Who if anyone did Kristin Lang as manager report to?

10 A Gene and Angie.

11 Q Who if anyone did Ryan Henry report to?

12 A Gene and Angie.

13 MR. FAYE: Your Honor, I would now ask based on to see  
14 whether or not Respondent would enter into a stipulation since  
15 we're talking about the same position as alleged to Mr. Henry,  
16 who was a manager. I haven't heard anything from Respondent to  
17 indicate anything different.

18 JUDGE CARISSIMI: Let's go off the record and the parties  
19 can have a conversation. Off the record.

20 (Off the record.)

21 JUDGE CARISSIMI: What is your position with regard to  
22 whether or not Ms. Lang is a supervisor within the meaning of  
23 Section 2(11) of the Act?

24 MR. SCHADLER: We are not willing to stipulate and we've  
25 had discussion about the reasons for that off the record, which

1 if the Court would like we will put on the record.

2 JUDGE CARISSIMI: That's up to you, sir. If you feel  
3 that's necessary, go ahead.

4 MR. SCHADLER: We'll simply leave it as we will not  
5 stipulate.

6 JUDGE CARISSIMI: All right. Mr. Faye, you may ask  
7 further questions if you wish to about Ms. Lang's supervisory  
8 status.

9 MR. FAYE: Your Honor, may we go off the record for a  
10 minute? I would like to look at the documents.

11 JUDGE CARISSIMI: Off the record.

12 (Off the record.)

13 BY MR. FAYE:

14 Q Can you tell us more about what you know about the  
15 authority of Kristin Lang when she was manager?

16 A Sure.

17 JUDGE CARISSIMI: Mr. Faye, in order to make this more  
18 understandable, I'm going to direct you to ask specific  
19 questions enumerating the authority set forth in Section 2(11)  
20 of the statute. That's a very open-ended question and I don't  
21 know where the witness is going to go with that. You know what  
22 the standards are, so ask some specific questions of the  
23 authority.

24 BY MR. FAYE:

25 Q What if any knowledge do you have as to Kristin Lang's

1 authority to hire an employee, to discipline an employee, or to  
2 fire an employee?

3 A Okay. Kristin Lang hired two co-bartenders while I was  
4 there.

5 Q Who?

6 A Joe Fairley and Mike Selino.

7 JUDGE CARISSIMI: How do you know that?

8 MR. FAYE: How do you spell Selino?

9 JUDGE CARISSIMI: How do you know that, Ms. Helms?

10 THE WITNESS: They were friends of hers. They were only  
11 introduced to Kelly's through her. They were friends that she  
12 had relationships prior to her coming to Kelly's.

13 JUDGE CARISSIMI: How do you know that she hired them?

14 THE WITNESS: She told me that she did.

15 JUDGE CARISSIMI: All right.

16 BY MR. FAYE:

17 Q When?

18 A I don't know the exact date that they were hired. Shortly  
19 after she started.

20 Q When during your employment? Your employment was roughly  
21 March of 2014 --

22 A Correct.

23 Q -- until April 30th of 2015.

24 A Yes.

25 Q Do you recall during what period? And if I understand



1 you, when I asked you when Ms. Lang was manager until, you said  
2 December of 2014.

3 A Correct.

4 Q So while she was manager while you were there, roughly  
5 March 2014 until December 2014, were these or any other  
6 employees hired by her during that period of time?

7 A I specifically recall these two employees being hired by  
8 her because they were outside friends of hers and that had come  
9 up in our work together, in our interactions.

10 Q Was this 2014?

11 A This was in 2014, between April and May I would -- my  
12 recollection is that that's when they started.

13 JUDGE CARISSIMI: Who were these discussions with? You  
14 referred to discussions.

15 THE WITNESS: Oh, my discussions were just general life  
16 discussions.

17 JUDGE CARISSIMI: With whom?

18 THE WITNESS: Joe Fairley, Mike Selino, and Kristin Lang,  
19 not all together but separately throughout the courses of  
20 working together.

21 JUDGE CARISSIMI: Specifically, if you recall any  
22 language, what did Ms. Lang tell you about her responsibility  
23 for the hiring of these two individuals?

24 THE WITNESS: Something to the effect of these are my  
25 friends; they're good; they're going to be great; they're fast;

1 they are going to behave well; and we need guys. So I found  
2 these -- these are two guys I know that I think will work out  
3 well.

4 JUDGE CARISSIMI: What if anything did she say about her  
5 involvement in the hiring process?

6 THE WITNESS: That she hired them. I mean it wasn't a  
7 really extensive conversation.

8 JUDGE CARISSIMI: Did she use those words?

9 THE WITNESS: That she hired them, yes, absolutely.

10 JUDGE CARISSIMI: Thank you. Mr. Faye, you may continue.

11 THE WITNESS: Did you want me to go on about the hiring  
12 and firing?

13 JUDGE CARISSIMI: Wait for a question.

14 THE WITNESS: Okay. I didn't know.

15 JUDGE CARISSIMI: Wait for a question.

16 THE WITNESS: Okay.

17 BY MR. FAYE:

18 Q What if anything else do you know about the authority of  
19 Kristin Lang as a manager to hire?

20 A She had me submit my paperwork again after she started so  
21 that she had a copy of it for the files with my -- it was an  
22 amended start date. I signed it for the day that she had me  
23 fill it out. I had previously filled out similar paperwork for  
24 Angie. But she, as the supervisor, said she needed to have  
25 copies of that and make sure she had copies of it.

1 Q I'd like to show you a document. You're referring to  
2 Kristin Lang, K-R-I-S-T-I-N, which counsel for Respondent had  
3 supplied prior to today's hearing in response to a subpoena.

4 JUDGE CARISSIMI: What exhibit number is this, sir?

5 MR. FAYE: General Counsel Exhibit 2.

6 JUDGE CARISSIMI: Thank you.

7 MR. FAYE: I just didn't know if you wanted to look at it  
8 first, Your Honor.

9 BY MR. FAYE:

10 Q Is this the document you're referring to?

11 A Yes, it is.

12 Q Can you please tell us what it represents?

13 A It was my contact information, my employee information for  
14 my hiring.

15 Q Who filled out this document?

16 A Myself and Kristin Lang.

17 Q Together or separately?

18 A Together.

19 Q In what role was Kristin Lang, at that time?

20 A Supervisor, manager.

21 MR. FAYE: Because some other documents, Your Honor, were  
22 pre-marked, I'd request instead that this document be marked as  
23 General Counsel Exhibit 5.

24 JUDGE CARISSIMI: All right, the document that the record  
25 is going to show as previously referred to as General Counsel 2



1 is really going to be General Counsel Exhibit 5. And that's  
2 the number it's going to have on it, if it is introduced into  
3 evidence.

4 (General Counsel's GC-5 identified.)

5 JUDGE CARISSIMI: Are you now moving to introduce General  
6 Counsel Exhibit 5, Mr. Faye?

7 MR. FAYE: Yes, Your Honor.

8 JUDGE CARISSIMI: Is there any objection to General  
9 Counsel 5?

10 MR. SCHADLER: Your Honor, no objection to the exhibit. I  
11 will have an objection as to I believe that they are going to  
12 be asking that he be found to be a supervisor or a manager, but  
13 I will reserve that till the time that they make that motion.

14 JUDGE CARISSIMI: General Counsel Exhibit 5 is admitted.  
15 (General Counsel's GC-5 received.)

16 MR. FAYE: I will make copies, Your Honor, at a break.

17 JUDGE CARISSIMI: And, Mr. Faye, since we're spending time  
18 on this and your position is that Ms. Lang is a supervisor  
19 within the meaning of Section 2(11) of the Act, are you going  
20 to amend the complaint to allege that?

21 MR. FAYE: No. I had not planned on amending the  
22 complaint, Your Honor, but it is the position of counsel for  
23 the General Counsel that Kristin Lang was the manager of  
24 Respondent and that she is a supervisor and agent of Respondent  
25 within the meaning of the Act.

1 JUDGE CARISSIMI: All right. And Mr. Schadler, your  
2 position on that?

3 MR. SCHADLER: I would object, Your Honor. There is a  
4 specific section, and Your Honor has touched on this, in the  
5 complaint. And as Your Honor is aware the pleading requirement  
6 is to put us on notice of these individuals because as Your  
7 Honor specifically articulated these comments are now  
8 attributed to my clients. It is to provide us notice so that  
9 we have a fair opportunity to explore that and to explore those  
10 comments because they will be held against us. We have started  
11 the hearing. We've had specific comments, conversations about  
12 amendments. And with respect to the Court, there was another  
13 judge Your Honor is aware of beforehand that we had  
14 conversations and conference calls going back to I want to even  
15 say into the middle of February where we talked about  
16 amendments and issues with the complaint.

17 As Your Honor saw, we were willing to stipulate and make  
18 appropriate concessions to speed things along to get to the  
19 issues. But now we have essentially started the hearing and we  
20 are essentially jackpotted with this information when it's  
21 clearly supposed to be stated in the complaint. So we would  
22 object to any kind of identification of this individual as  
23 fitting within the Act because the statements will come to be  
24 attributed to our clients, which runs afoul completely to the  
25 rules of procedure.

1 JUDGE CARISSIMI: I'm going to overrule the objection to  
2 listening to this evidence. Now if you wish to -- contest  
3 about it you can do so. And if you tell me you need time to  
4 prepare a defense to the General Counsel's position that Ms.  
5 Lang is a supervisor within the meaning of the Act, he says  
6 agent, my critical consideration is whether or not someone  
7 meets the criteria of Section 2(11) given the position that the  
8 individual held.

9 I'll give you time to gather evidence if you wish to  
10 contest that, but I'm going to hear evidence with regard to  
11 this individual and I'm going to make a decision because I  
12 think I am required to given what I've heard in this case so  
13 far as to whether this person is a supervisor within 2(11)  
14 and/or an agent within the meaning of Section 2(13).

15 So with that, you may proceed, Mr. Faye.

16 MR. SCHADLER: Thank you, Your Honor. And just so the  
17 Court is clear, I'll speak with my clients about this issue  
18 once we hear some of the testimony given and also determine  
19 whether or not we need additional time to track that  
20 information down.

21 JUDGE CARISSIMI: Very good.

22 MR. SCHADLER: And I appreciate the Court's courtesy.

23 MR. FAYE: We are on the record, Your Honor, correct?

24 JUDGE CARISSIMI: We are on the record.

25 MR. FAYE: I, frankly, am not 100 percent sure it did not



1 get cut off when I asked my question and Ms. Lang -- Ms. Helms  
2 was giving her response because of the objection.

3 JUDGE CARISSIMI: You can ask your question again.

4 MR. FAYE: I think both got in and I don't want to lead.  
5 I had asked a question -- the question I asked was in late  
6 November or early December 2014, what if anything did Ms. Lang  
7 tell you about complaining. I know that she began the  
8 testimony because I --

9 JUDGE CARISSIMI: That's all right. Let's make sure that  
10 we get an answer to your question. Do you understand the  
11 question?

12 THE WITNESS: I do, I do. Re-answer it?

13 JUDGE CARISSIMI: Yes, you can answer, Ms. Helms.

14 THE WITNESS: Kristin told me that -- she asked me not to  
15 make complaints to Gene about her mismanagement of the  
16 schedule, that she couldn't take that stress this late in her  
17 pregnancy, that it wasn't going to get me anywhere anyway, that  
18 there was just going to be a retaliation of me losing shifts  
19 and hours.

20 BY MR. FAYE:

21 Q What if anything did she say would happen?

22 A That she was just going to be yelled at by Gene and Angie,  
23 which would then cause her the stress that I referenced.

24 Q Thank you for repeating. In October or November, 2014,  
25 did Ms. Lang have a discussion with a group of employees?

1 A She did.

2 Q Were you present?

3 A I was.

4 Q Where?

5 A It was upstairs at the guest side of the service bar area  
6 of the main bar. I'm sorry --

7 MR. SCHADLER: Your Honor, may I object also. I want to  
8 put this on the record as well. We're talking about time  
9 frames that fall way outside of the range that has been pled in  
10 4(a) as well. So we've essentially taken the entire hearing we  
11 prepared and moved it back four months and now we're including  
12 things -- it's a complete ambush at this point. The complaint  
13 was not amended to include this woman as a supervisor of  
14 Respondent, nor was it amended to include any of these  
15 conversations that they are now alleging took place and are  
16 attributable to my client.

17 We're talking about -- we were provided a complaint and  
18 hearing notice. I'm a bit frustrated because we even filed a  
19 Bill of Particulars in this case, which we do not normally do,  
20 and now we've both expanded who is included as a manager and  
21 also the time frame that we're talking about which is  
22 specifically stated in the complaint as March and April of  
23 2015. And we're going all the way back now to 2014.

24 JUDGE CARISSIMI: Mr. Faye, do you want to respond to  
25 that?

1 MR. FAYE: Well, first of all, there was a Bill of  
2 Particulars and it was denied and denied very quickly by Deputy  
3 Chief Judge Arthur Amchan. Second of all, we're talking about  
4 a very limited period of time even with these questions. I've  
5 gone back -- she was fired, Ms. Helms was fired April 30, 2015,  
6 so I've gone back as far as half a year on a few questions, on  
7 certain questions. But they're relevant to, I think to --

8 JUDGE CARISSIMI: Relevant to what, sir? What's the  
9 relevancy?

10 MR. FAYE: I think to what happened as far -- I don't want  
11 to lead the witness with her sitting here but --

12 JUDGE CARISSIMI: All right, I want to hear this. This  
13 happens sometimes, Ms. Helms. I'm going to ask you to step  
14 outside the hearing room.

15 THE WITNESS: Sure.

16 MR. SCHADLER: Would you like Angie to step outside as  
17 well, Your Honor?

18 JUDGE CARISSIMI: No, she does not have to.

19 MR. SCHADLER: Thank you, Your Honor.

20 JUDGE CARISSIMI: And we'll let you know when we're ready  
21 to start the testimony.

22 THE WITNESS: Here? Or do you want me to go further away?

23 JUDGE CARISSIMI: As long as you can't hear anything  
24 coming through.

25 THE WITNESS: Go up to like the glass doors?



1 MR. SCHADLER: There's a waiting room where the glass  
2 doors --

3 THE WITNESS: Yeah, sure, I can do that.

4 MR. FAYE: Are we on the record, Your Honor?

5 JUDGE CARISSIMI: We are on the record.

6 MR. FAYE: There were objections that you sustained, Your  
7 Honor, as to the viewpoints from her standpoint as to the  
8 feelings and thoughts of other employees as background. So  
9 instead I was going through more specifics.

10 JUDGE CARISSIMI: Well, you need specifics, sir, because  
11 feelings and impressions mean nothing to me. I can't base  
12 findings on that. So as I said, if you have specifics that's  
13 one thing and I'm going to let you do that. But the Respondent  
14 has an objection. I mean if you felt, in other words, this  
15 person wasn't in the complaint. Now that's gone. I mean that  
16 didn't happen. Now I have an issue with respect to this and I  
17 need to decide this issue.

18 I'm going to let you continue with this. You're going to  
19 need to have -- I need more evidence on the supervisory status.  
20 Mr. Schadler, I'm going to give you, as I say, if you need time  
21 to find a witness, bring a witness in, I'm going to have to  
22 give you that given these circumstances. If we can't finish  
23 this hearing in this sitting that's unfortunate but that's what  
24 we're going to have to do.

25 MR. SCHADLER: I appreciate that, Your Honor. My

1 objection is noted for the record. I appreciate the Court's  
2 position that we find ourselves in.

3 JUDGE CARISSIMI: So you tell me what you want to do, sir.  
4 I agree this wasn't in the complaint and given the way NLRB  
5 proceedings work, this is the first time you've heard about any  
6 of this.

7 MR. SCHADLER: That is correct, Your Honor.

8 JUDGE CARISSIMI: All right.

9 MR. FAYE: Well, I didn't allege, Your Honor, that  
10 anything that Ms. Lang said is independently --

11 JUDGE CARISSIMI: No, sir, but you told me that you're  
12 going to rely on this as background evidence to support your  
13 case, right? Now again if it was an admission from a  
14 supervisor agent, that's one thing. If it's hearsay  
15 statements from an employee it may be admissible, but it  
16 doesn't carry the same weight. We all know that.

17 I'm going to let you proceed. But I have to be fair to  
18 Respondent. And if they tell me, whatever they tell me, I'll  
19 have to deal with it. We'll all have to deal with it. Are we  
20 ready to go?

21 MR. FAYE: Yes.

22 MR. SCHADLER: Would you like me to get the witness, Your  
23 Honor?

24 JUDGE CARISSIMI: Yes. Let's go off the record.

25 (Off the record.)

1 JUDGE CARISSIMI: Back on the record.

2 Mr. Faye, you may proceed.

3 MR. FAYE: Thank you.

4 BY MR. FAYE:

5 Q Ms. Helms, I asked you about a discussion in October or  
6 November 2014 with a group of employees in which you were  
7 present?

8 A Yes.

9 Q Where was it held?

10 A By the service bar area of the main bar.

11 Q At this meeting, what if anything did the employees tell  
12 Ms. Lang?

13 A There were discussions about the general unhappiness with  
14 some of the shift things that had been happening lately.

15 Q With the shift?

16 A With the shift scheduling.

17 JUDGE CARISSIMI: What employees were present, Ms. Helms?

18 THE WITNESS: I recall myself there, Joe Fairley there,  
19 Kristin Lang. I am almost certain Chris Healy was there.

20 BY MR. FAYE:

21 Q What was the name?

22 A Chris Healy.

23 Q That's a male so it's C-H-R-I-S?

24 A C-H-R-I-S.

25 Q H-E-A-L-Y.



1 JUDGE CARISSIMI: Mr. Healy, what did he do at Kelly's  
2 Taproom?

3 THE WITNESS: He was a server at that point.

4 JUDGE CARISSIMI: All right. You may continue, Mr. Faye.

5 MR. FAYE: Well, in response to what the employees  
6 complained about what did Ms. Lang reply?

7 JUDGE CARISSIMI: I'm a little uncertain. Rather than  
8 saying employees, I have some names here now. What did you say  
9 if anything to Ms. Lang at this meeting, Ms. Helms?

10 THE WITNESS: I was informal. It wasn't a planned  
11 meeting. It was very informal. It was issue with start time,  
12 upcoming schedule, what the start times were. Joe --

13 JUDGE CARISSIMI: Last name, please?

14 THE WITNESS: Joe Fairley had similar complaints. Joe  
15 specifically had complaints that he worked day shifts and,  
16 therefore, he should get all the early start times that were  
17 available and that anyone that didn't work a day shift,  
18 therefore, shouldn't get any early start times. So he made  
19 that complaint to Kristin.

20 And my rebuttal to that was that I pick up Sundays. By  
21 working that terrible shift which is very much equal to or less  
22 than a day shift that I was also then entitled to some of these  
23 early start times, that I was essentially paying my dues also  
24 by going in to work days and hours that I knew I wasn't going  
25 to make any money.

1 JUDGE CARISSIMI: What if anything did Mr. Healy say?

2 THE WITNESS: I think he wasn't making complaints so much  
3 as he said he just would like to be on the bar staff.

4 JUDGE CARISSIMI: Mr. Faye, you may proceed.

5 BY MR. FAYE:

6 Q In response to the employees, what did Ms. Lang reply?

7 A That complaining wasn't going to get us anywhere. Again,  
8 that it would just cause loss of hours and not essentially get  
9 us what we wanted. That he wasn't going to get earlier start  
10 times. I wasn't going to get earlier start times by bringing  
11 it to Gene or Angie.

12 Q What if anything more specifically did Ms. Lang state  
13 about Gene Mitchell?

14 A I apologize for my language. She said that he would lose  
15 his shit, those words, if we brought it up to him.

16 Q Who is the he?

17 A Sorry, Gene.

18 JUDGE CARISSIMI: And don't worry about any language.  
19 There's all kinds of language that comes out in these hearings,  
20 so what's important is that you tell us as best you can about  
21 exactly what was said.

22 BY MR. FAYE:

23 Q So if I understand right, Gene will lost his shit if?

24 A The rest of it, I couldn't --

25 Q To the best of your memory.

1 A To the best of my memory, she said that phrase often and  
2 she said it about this conversation. I remember because Joe  
3 and I were pretty much back and forth with both of us feeling  
4 that we earned those earlier shifts. And after that, he would  
5 lose his shit was the end of her exact wording. After that  
6 it's just what I took away from it.

7 Q Okay. During your last month to month and a half employed  
8 by the Employer, Kelly's, what if anything did you indicate to  
9 manager Ryan Henry about shift scheduling during your last  
10 months of employment?

11 A I indicated to Ryan that I was concerned about what the  
12 schedule was going to look like moving forward, that I was  
13 upset about the shift scheduling, and that it was shared by  
14 myself and my co-workers.

15 Q What was shared?

16 A Our frustration, our general unhappiness.

17 Q Was this an isolated conversation that you had during your  
18 last month to month and a half with Mr. Ryan or was this --

19 A No. It was very ongoing.

20 Q In late March 2015, did you and Kris Flood, together?

21 COURT REPORTER: Hold on a second.

22 JUDGE CARISSIMI: Off the record.

23 (Whereupon, a luncheon recess was taken at 11:40 a.m.)

24



1 A F T E R O O N S E S S I O N

2 (12:45)

3

4 JUDGE CARISSIMI: On the record. Mr. Schadler?

5 MR. SCHADLER: Yes, I will, Your Honor. As we were  
6 leaving and we were leaving due to an issue with the court  
7 reporter, so I know none of this was on the record, the Court  
8 in the presence of both counsel had asked myself to discuss  
9 with my clients regarding the stipulation that was originally  
10 proposed regarding Kristin as a manager, which we had  
11 originally said we would not stipulate to. I would like to put  
12 both what our decision is regarding that request and also an  
13 additional statement on it regarding what our real issue is.

14 First off, I think if the evidence was put forward, in  
15 candid of the tribunal and in accordance with the ethics of my  
16 client, the government would be able to prove that she was a  
17 manager within the Act. However, we were served with this  
18 complaint in December of 2015 and we were given very scant  
19 information about it. We actually made a motion for a Bill of  
20 Particulars in this case specifically articulating this issue  
21 because we didn't have any information. The government chose  
22 not to amend this complaint. In fact, we have had no less than  
23 four phone calls with the government and the judge prior to  
24 Your Honor, Judge Flynn, where we had asked every time would  
25 there be amendments. We were told that there was one amendment

1 but we were promised specifically that the amendment would not  
2 be substantive.

3 Now if the government is not moving to amend the  
4 complaint, then the information being offered to this Court is  
5 irrelevant because it would have no bearing on the matter being  
6 brought forward. The complaint is in these proceedings the  
7 life blood of the defense because it needs to prepare for these  
8 hearings. It provides us the time frame and the individuals  
9 that we should be looking at.

10 We did our due diligence. We have prepared for a third of  
11 the year for this proceeding, since December. We have prepared  
12 given the very little information we had. When we asked for  
13 more, we were told there was none or that they would not  
14 acquiesce because they denied our -- they moved to oppose our  
15 motion and denied it.

16 Now without amending it, amending the complaint, they are  
17 seeking to amend the complaint. This is a significant  
18 prejudice to our client. And I understand that the Court is as  
19 handcuffed as we are on this issue. We have had no notice.  
20 And I know that the Court has been most gracious in its  
21 handling of the matter and saying that we would have more time,  
22 but we prepared for a third of a year and my clients have spent  
23 time and money on this issue. And to be clear, they want this  
24 matter to be over with because they understand these things  
25 need to move forward and move on, what they have done, and that

1 they will be vindicated.

2       However, the fact of the matter is, is we are standing  
3 here in the middle of a hearing and now we are being bombarded  
4 with additional information that could change significantly the  
5 conversations I had with my client prior to. And could quite  
6 frankly change the strategy that I provide for the court to see  
7 as my considerable best effort, based on what you can see at  
8 the table.

9       So my argument so much isn't the fact that they can't  
10 prove that she is a manager. They can. This runs afoul of any  
11 notion of fairness. It deprives my client the opportunity to  
12 really effectively prepare for this hearing. The Court has  
13 been most gracious in its understanding of this issue and has  
14 afforded us additional time if necessary.

15       Really, we were given a roadmap and now told that we're  
16 completely changing course. And now we'll be forced to defend  
17 a completely different action than the one we received in  
18 December which at anytime prior to this hearing the government  
19 could have moved to amend and we would have had a fairness, we  
20 would have had no issue with it. The government not two weeks  
21 ago dropped a subpoena on us seeking numerous items. We moved  
22 as fast as we could, my clients and I, to comply. And we  
23 actually got it in the night before it was due because we  
24 wanted to be fair to the government, to give them an  
25 opportunity to have this material.



1       Despite all of that we stand here in the middle of a  
2       hearing and now are being told that the charges, the  
3       substantive matters of this charging document are being  
4       completely changed both in its extended scope and also  
5       witnesses.

6       Your Honor is exceedingly well-versed in the law and knows  
7       exactly what it means to label a person a manager in these  
8       proceedings. It's severe detriment to my client. This is an  
9       individual not named in the complaint and also for a time frame  
10      not contained in the complaint. The prejudice is enormous and  
11      our issue isn't so much with agreeing with the government's  
12      contention that she is a manager, I'll stipulate that she is.  
13      It is what flows from that and the severe prejudice my client  
14      has. And I'd just like to put that on the record.

15      JUDGE CARISSIMI: Thank you, sir. I'm going to accept the  
16      stipulation that Ms. Lang is a supervisor within the meaning of  
17      the Act. As I indicated, if the failure of the General Counsel  
18      to allege her to be a supervisor and/or agent has caused the  
19      Respondent to feel that they are prejudiced, I will give the  
20      Respondent whatever reasonable time that they request in order  
21      to prepare to meet the issues raised by the General Counsel's  
22      contention first made in this trial that Kristin Lang is a  
23      supervisor and agent within the meaning of the Act.

24      So with that we will proceed.

25      MR. FAYE: Your Honor, I'd like an opportunity to respond

1 briefly.

2 JUDGE CARISSIMI: You may.

3 MR. FAYE: To the speech. I don't feel that counsel has  
4 been severely handicapped at all. Well before the complaint,  
5 the charge, the investigation, and I would think the Respondent  
6 would have been aware. All that I am bringing up is stuff that  
7 came up during the investigation, so that doesn't mean the  
8 Respondent didn't know everything that we're talking about  
9 during the investigation because it didn't come up post  
10 investigation. It came up during the investigation. This is  
11 not new evidence.

12 Second of all, I was not the investigator. I am also not  
13 the one who drafted the complaint. At that time, the regional  
14 attorney has also retired on January 2nd of '16, so I don't  
15 think their remarks have much basis.

16 Second of all, we don't have to plead every single person  
17 that's touched upon in the complaints, in Paragraph 3 that  
18 there were no ULP's alleged to be committed by this individual.  
19 But her name came up during the investigation stage.

20 JUDGE CARISSIMI: All right. As I said, I'm going to  
21 accept the stipulation. But I will tell you, sir, the internal  
22 rationalizations of the Region are not my concern. What I am  
23 concerned about is conducting the hearing fairly and  
24 efficiently, and the complaint is the document that notifies  
25 the Respondent of what the issues are that are to be litigated.

1           Now you are correct there are no unfair labor practices  
2   attributed to Ms. Lang. So I guess it is true there is not a  
3   requirement that she be alleged to be a supervisor in the  
4   complaint. But in this hearing it has become an issue  
5   regarding statements that she made. Now those issues are un-  
6   important because I am sure, as you indicated, you're going to  
7   contend in your brief that she is in fact a supervisor and any  
8   statements she makes, if I were to credit Ms. Helms' testimony,  
9   are admissions against inference against the Respondent. Am I  
10   correct, sir?

11           MR. FAYE: Yes, it's true, Your Honor.

12           JUDGE CARISSIMI: So that is the case. And so  
13   consequently it would have been better in my view if the  
14   Respondent had been notified that that is someone who you are  
15   claiming to be a supervisor and agent, and they could have  
16   prepared more adequately prior to the hearing.

17           At this juncture, the evidence is relevant clearly. So  
18   the only thing I can do is to give the Respondent an  
19   opportunity if they need it to have more time to rebut these  
20   allegations if they feel they have a need to do so.

21           MR. FAYE: I understand, Your Honor, I do want to say  
22   since it was attributed to me, my representations about what if  
23   anything I might amend on the complaint. I was trying to give  
24   a heads-up but I don't have the authority on my own to simply  
25   amend the complaint and was contemplating an amendment, and my



1 point was it was not -- I said it would not add anything. If  
2 anything it's going to take away. And, indeed, once I had  
3 approval, I notified counsel that I was amending now half of  
4 the sentence of the amendment I was referring to. But I  
5 clearly said I wouldn't be adding anything. I would be  
6 deleting something, if anything, which I did.

7 JUDGE CARISSIMI: Again, along those lines, I want to make  
8 a statement that I haven't made beforehand but it's been my  
9 policy longstanding and you can look at the cases I've written.  
10 My policy is that if there are any complaint amendments to be  
11 made, they must be made before the General Counsel rests its  
12 case unless something comes up on the Respondent's case that  
13 the General Counsel couldn't have anticipated.

14 There are cases that say administrative law judges and the  
15 Board, itself, can make findings of unfair labor practices  
16 based on matters that weren't alleged in the complaint if they  
17 were "fully litigated." That is not my policy. My view is to  
18 afford a fairness to the Respondent, if there's going to be any  
19 complaint amendments made, they have to be made here so that I  
20 know and so the Respondent knows what the trial is about. Now  
21 the other thing is and it ties into this, if I credit any  
22 statements made by anybody who is a 2(11) supervisor or 2(13)  
23 agent, if they are not alleged in the complaint to be an unfair  
24 labor practice, I'm not going to find them to be an unfair  
25 labor practice. I may consider that evidence with regard to

1 the questions that are presented in the complaint, i.e. the  
2 alleged unlawful discharge of Ms. Helms under Section 8(a)(1),  
3 but I'm not going to find anything to be an unfair labor  
4 practice unless it's either in the complaint or amended in the  
5 complaint and this hearing.

6 Now I don't anticipate that there will be, but I want to  
7 put you on notice that that is my policy and I always adhere to  
8 it. All right?

9 MR. FAYE: I hear you, Your Honor. I mean I would  
10 respectfully of course disagree to that general principal  
11 because of the case *Redd-I* of closely related allegations. If  
12 they're fully litigated, the ALJ can certainly find violations  
13 based on the evidence produced at a hearing and the evidence  
14 can be conformed to the pleadings.

15 JUDGE CARISSIMI: Right. But that is not something I'm  
16 going to do and I'm putting you notice and all parties on  
17 notice, but particularly General Counsel, that I just don't do  
18 it. And the statement at the hearing I think is a fair  
19 indication so that nobody is surprised by that.

20 All right. I think we've covered the procedural issues  
21 that we needed to discuss at this point.

22 MR. SCHADLER: Thank you, Your Honor.

23 MR. FAYE: Well, I would enter into that stipulation that  
24 Kristin Lang, K-R-I-S-T-I-N, is a statutory supervisor and  
25 agent within the meaning of the Act. I would request that that

1 stipulation be entered into and received.

2 JUDGE CARISSIMI: And in an abundance of caution, I think  
3 it's clear, but, Mr. Schadler, are you willing to enter into  
4 that stipulation?

5 MR. SCHADLER: I am willing to enter into that stipulation  
6 with the statement that I made and --

7 JUDGE CARISSIMI: Very good.

8 MR. SCHADLER: -- making the issues I think fairly clear  
9 for the Court. Thank you.

10 JUDGE CARISSIMI: I will accept the stipulation.  
11 Therefore, we won't need any further evidence regarding the  
12 alleged supervisory status of Ms. Lang and we can proceed only  
13 on the substance. Mr. Faye, you may proceed.

14 MR. FAYE: Your Honor, where we left off, I had asked a  
15 question that was not answered because of technical  
16 difficulties from the court reporting.

17 BY MR. FAYE:

18 Q The question I had asked which is on the record is in late  
19 March 2015, did you and Kris Flood together have a conversation  
20 with Ryan Henry?

21 A Yes, we did.

22 Q Where?

23 A In the office, his office downstairs.

24 Q What did you and Ms. Flood say to him?

25 A We noted our concerns about the shift scheduling, the



1 changes that were going to be coming about with Mike. We  
2 wanted to make sure that senior bartenders, herself and I most  
3 specifically included in that, would receive the shifts that he  
4 was then leaving available, the prime 5 o'clock shift on  
5 Thursday, Friday, and Saturday night.

6 Q I'm sorry that who was leaving?

7 A Mike. Mike had held those shifts for years.

8 Q What's the last name?

9 A Mike Bebevino.

10 Q B-E-V-E-V-I-N-O. Who is Mike Bebevino?

11 A He was the head bartender throughout my employment at  
12 Kelly's.

13 Q When you said we, did you make these comments, or Ms.  
14 Flood make these comments, or both of you make these comments?

15 A It was very much a conversation between the three us. So  
16 Kris and I both brought those concerns to him of the same  
17 nature that we had discussed prior to going in the room.

18 Q And this is Kris Flood, K-R-I-S?

19 A Correct.

20 Q Who is Mike Bebevino?

21 A He was a bartender, the head bartender at Kelly's.

22 Q When did Mr. Bebevino leave the Employer?

23 A The end of March roughly.

24 Q 2014?

25 A Correct -- no, 2015.

1 Q Oh, 2015, I'm sorry.

2 A Yes.

3 Q What did Mr. Henry reply to you and Ms. Flood?

4 A That he was sympathetic to our complaints but he was  
5 employed for them and there was nothing he could do about it.

6 Q What if anything did he say about Gene and Angie's --  
7 about Gene and Angie or their reaction?

8 A He said, it would definitely not result the way we wanted  
9 with securing those shifts. That by us bringing this, these  
10 complaints, these issues to his attention and to their  
11 attention that we would just receive retaliation, loss of shift  
12 hours or shifts all together.

13 Q How many bar areas were there at Kelly's?

14 A Two.

15 Q Is that an all time -- all seasons or some seasons?

16 A Some seasons, the upstairs bar wasn't open and most of the  
17 summer and while the Villanova students were on break.

18 Q Thank you. Who mainly tended the bar areas on Thursday,  
19 Friday, and Saturday nights?

20 A Flood, Sarah and I consistently worked together.

21 Q Sarah's last name?

22 A Clark.

23 Q Sarah, S-A-R-A-H, Clark, C-L-A-R-K. What if anything did  
24 you almost always talk about during downtime when you worked  
25 with Kris Flood, or with Sarah Clark, or with both?

1 A Between doing our side work and things, our conversations  
2 often went back to our unhappiness, our frustration with the  
3 schedule, with the inconsistencies, and what we could do about  
4 it essentially.

5 Q What if anything did you and Kris and/or Sarah, Kris Flood  
6 and/or Sarah Clark speak about as to new employees?

7 A Specifically in this time frame we were concerned that  
8 with Mike leaving --

9 Q Mike Bevevino?

10 A -- what would happen with the new hires. There were an  
11 influx of new hires and there were issues in the past where I  
12 had lost shifts without any sort of explanation when someone  
13 new joined the staff and they would be given my shifts, shifts  
14 that I typically worked.

15 Q You referred to in this time frame or in this period.  
16 What period are you talking about?

17 A April.

18 Q Of --

19 A 2015, right there at the end of the school year, right as  
20 Mike was resigning.

21 Q What if anything was said about the busy season coming up?

22 A We were concerned that these new employees would be given  
23 the prime shifts as the busy season approached which was our  
24 time for really squeezing in as many hours, as many shifts as  
25 possible so we could make money before this season recessed.



1 Q What are the prime shifts again?

2 A Thursday, Friday, Saturday starting at 5:00.

3 Q p.m.?

4 A p.m.

5 Q When is the busy season?

6 A Mid to late April through first week of June, right then.

7 Q Why is -- any reason for that?

8 A It's the commencement ceremonies that take place at  
9 Villanova University. Other graduations at local high schools  
10 and universities often brought an influx of impromptu parties.  
11 The end of classes, professors often brought their classes in  
12 unannounced, last minute, so we were generally much busier than  
13 we were on a regular -- even on a Wednesday night we would be  
14 busier than we would have normally been on any other Wednesday  
15 during the season.

16 Q Is this the busy season for 2015 or is this an annual  
17 thing?

18 A It happens with graduation ceremony. Also, it exceeds  
19 till the first week of June because a lot of the students are  
20 still on campus. They still have their housing. Seniors, they  
21 often live off campus in local apartments so their leases run  
22 until June, so they are often there. Once they graduate, they  
23 are still there just drinking because they don't have class.  
24 The first week of June is alumni weekend so that brings in  
25 especially a lot of older graduates that that's probably one of

1 the best weekends of the year.

2 Q You referred earlier to a Chris Healy, C-H-R-I-S. Can you  
3 tell me again who he is?

4 A When I started at Kelly's, he was -- towards the beginning  
5 of my employment he was a server and he eventually started,  
6 because he had been there so long, he worked his way up to  
7 being on the bar staff.

8 Q Strictly?

9 A No. He was trying to strictly be on the bar staff. When  
10 I was terminated, he was not completely on the bar staff.

11 Q So his other duties were as a?

12 A Server.

13 Q In April of 2015, did you and Chris Healy have a  
14 conversation with Ryan Henry?

15 A We did.

16 Q Where was that?

17 A It was upstairs, the second floor bar, as I was setting up  
18 for the night.

19 Q What if anything did Mr. Healy say?

20 A He said that with the influx of new people he had just met  
21 Lisa, it was her first training day. I don't know her last  
22 name. I only met her one time.

23 Q What was her job?

24 A She was training as a bartender.

25 Q He said that with her joining the team, he wanted to make

1 sure that he was going to be considered someone with seniority  
2 and given some more bar shifts before they were given to the  
3 new hires.

4 Q What did Ryan Henry say to that?

5 A He said that we couldn't guarantee you anything.

6 Q What did you say?

7 A I again noted my concerns to him about what was happening,  
8 the general feeling of frustration among us. That as these new  
9 hires would receive the prime spots or again be put on a shift  
10 that we had typically worked and then we'd be removed from them  
11 all together.

12 Q Well, what did Ryan Henry say to that?

13 A Same answer. He worked for Gene and Angie and he did what  
14 they told him to as far as when I'd been taken off for new  
15 employees to be filling my spot in the past.

16 Q So what did you do?

17 A I told him that when I got to work that night I already  
18 drafted an email to Gene; and I showed him; and he said, it's  
19 not going to get you anywhere.

20 Q An email about what?

21 A About my concerns, about wanting to secure -- to know that  
22 my position was secure because I did a good job. That I,  
23 through consistent work and picking up the terrible shifts,  
24 that I had earned some better shifts through a year of great  
25 performance. And he told me that it wasn't going to get me



1 anywhere, that it was just going to anger Gene and not to send  
2 the email.

3 Q Did you send it or not?

4 A I did not.

5 Q So it was drafted but not sent, is that correct?

6 A It was.

7 Q Yes, thank you. What if anything happened on April 30,  
8 2015?

9 A I was fired.

10 Q Was there a meeting or no meeting?

11 A There wasn't a formal meeting scheduled. I went into work  
12 as normal and called to the office.

13 Q You went to work at what time, ma'am?

14 A A five o'clock start time that day from what I recall.

15 Q What if anything happened when you walked in to start your  
16 shift at approximate 5:00 p.m.?

17 A I put my things down behind the terminal. I always put my  
18 things the first terminal where we gathered closest to the  
19 service area. And then I was asked to go to the office to  
20 discuss the computer issues that had happened the night before.

21 Q There were computer problems the night before?

22 A There were computer problems.

23 Q What happened next? What if anything did you do or where  
24 did you go?

25 A I went down to the office where Ryan and Angie were.

1 Q Do you recall who if anyone asked you to come downstairs?

2 A Not specifically. I would --

3 Q Best of your recollection?

4 A Ryan Henry.

5 Q Now you said you walked into where downstairs? Where  
6 downstairs did you go?

7 A The office downstairs.

8 Q Is this a management office?

9 A It's what I referred to earlier as Ryan's office. It was  
10 the only office, but it was designated for whoever was -- if  
11 Ryan was the person that was our supervisor at that time, it  
12 was Ryan's office. It was also the office where we did our  
13 closing reports, submitted our money, did our drops, those  
14 types of things.

15 Q Who did you -- did you go in alone or with anyone else, or  
16 were others in the room?

17 A I recall Angie standing on the one side of the room along  
18 a desk area and Ryan was in the far back corner leaning up  
19 against the other desk. There were some rudimentary built  
20 desks that were kind of -- I don't even know if they were  
21 actually formal desks. They were pieces of tabletop that were  
22 against the walls in different areas. One had the safe under  
23 it. Angie was right in front. Ryan was in the far back, right  
24 corner.

25 Q Is this what you saw when you walked in?

1 A Yes.

2 Q Who is Angie Mitchell?

3 A She was a co-owner of Kelly's -- she is a co-owner of  
4 Kelly's.

5 Q Right, thank you.

6 JUDGE CARISSIMI: Is that the Angie that you're referring  
7 to as president?

8 THE WITNESS: I have never heard her name any other way  
9 other than that until today.

10 JUDGE CARISSIMI: Thank you.

11 BY MR. FAYE:

12 Q What if anything did Angie Mitchell ask you?

13 A She had a piece of paper in front of her and she asked me  
14 -- a pen and she was reading something, and asked me so what  
15 happened with the computers last night.

16 Q What did you reply?

17 A I started to answer her about how they had stopped  
18 working.

19 Q How did she act?

20 A Disengaged. She was looking past me, wasn't paying  
21 attention to my answer.

22 Q Who if anyone then came into the office?

23 A I noticed that Angie looked past me and her glare stayed  
24 past me, so I turned. Gene was standing in the door at that  
25 time.



1 Q Is this Gene Mitchell?

2 A It is Gene Mitchell.

3 Q Who is Mr. Mitchell?

4 A He is the co-owner of Kelly's.

5 Q What did Mr. Mitchell do?

6 A I'm not sure if he already had paper in his hand or he  
7 reached and took a paper out of a pocket, but as I was turning  
8 there was a paper in his hand and he said that he had listened  
9 to hours of tapes, he heard what I said about us and that I  
10 hurt their feelings, they can't -- they won't take that, and I  
11 was fired.

12 Q Did he say who the "us" was?

13 A No.

14 Q Who did you take that to mean?

15 A I took it to mean Gene and Angie. It could have  
16 encompassed Ryan as far as my frustration with the supervisory  
17 body there.

18 Q What if anything did he say about documentation?

19 A Well, he said he documented it and referenced the piece of  
20 paper that was in his hand. It was folded. I couldn't read it  
21 or see it. But I took it to mean he had written some notes  
22 about what I had said specifically that upset him.

23 Q What happened next?

24 A He left and I turned my attention back to Angie.

25 Q What if anything did you ask?

1 A I think I just blankly said what.

2 Q As far as you recall --

3 A I had no idea what was happening.

4 JUDGE CARISSIMI: Talking over each other. Let the  
5 witness finish her answer, Mr. Faye.

6 THE WITNESS: I'm sorry, what just happened?

7 BY MR. FAYE:

8 Q As far as you can recall, what if anything did you ask  
9 Angie Mitchell?

10 A I turned to her and said what?

11 Q What did Angie Mitchell reply?

12 A She said that she wasn't sure if I knew this at the time  
13 that when the camera system was updated, the security camera  
14 system, that listening devices were also installed, that they  
15 recorded my complaints, it hurt their feelings and that was  
16 pretty much the end of I think that interaction.

17 Q What if anything did you say about Mr. Henry's knowledge?

18 A At the same time she turned to him. She said I don't  
19 really think that anyone knew that those listening devices were  
20 installed. She turned to Ryan to incorporate him into the  
21 conversation. He was a little behind her. I don't even think  
22 Ryan knew what she said. And Ryan had his arms folded across  
23 his chest and he sort of shrugged he didn't know that there  
24 were listening devices also and that they had heard our  
25 complaints.

1 Q All right. Next what if anything did Ms. Mitchell -- Mrs.  
2 Mitchell say concerning discharging?

3 A She said that although -- that Gene wanted to bring all  
4 the staff in because it was everybody making the complaints,  
5 fire everyone, clean house was the exact phrase she used, start  
6 fresh on Monday with new staff. He wanted to close the  
7 building for the weekend and cease operations and that she had  
8 to talk him out of it.

9 Q What if anything did she say about friends?

10 A She said that they had expected friends coming in that  
11 night. She would be mortified if her friends overheard our  
12 talking. Although it was clear from the tapes that our  
13 discussions among ourselves had not -- myself and my co-workers  
14 had not at all been overheard by the guests at the bars in our  
15 complaining, that they were strictly among us, that she was at  
16 that point concerned that for some reason then they would be  
17 heard that night from her friends.

18 Q What if anything did she say about who was talking?

19 A She indicated that it was all of us, that it the staff in  
20 general and that Gene wanted to fire everyone because of it.

21 Q It was the staff in general that did what?

22 A That was complaining about the working conditions and that  
23 he wanted to fire everyone.

24 Q What if anything was your response if guests -- what if  
25 anything was your response, period, to Angie Mitchell's



1 comments?

2 A I told her I absolutely never talked to any guests and  
3 that I did, in fact, complain to my co-workers about working  
4 conditions.

5 Q You never talked to guests or about anything in  
6 particular?

7 A I never talked to guests poorly about them ever. Not  
8 about any situation that arose.

9 Q Did you tell Angie -- Ms. Mitchell that?

10 A I did. I did tell her that I had never -- that of course  
11 She wouldn't hear me doing anything like that on the tapes  
12 because it never happened.

13 Q What if anything did you next say to Ms. Mitchell about  
14 your performance?

15 A I told her that it was happening this way. That I in  
16 large part didn't understand it because I consistently showed  
17 up for work. I was the only person that was nice to the kids.  
18 There were complaints about other bartenders and their general  
19 moodiness and poor service. And I couldn't understand that I  
20 rang in a good amount of money. I was very good at my job so  
21 why based on complaining about something was valid was this  
22 happening.

23 Q And what if anything did you say about your attendance or  
24 about your dealings with customers?

25 A I noted to her that I was never called out, never missed a

1 day. Despite having two small children, I never missed work.  
2 I always put it ahead of a lot of things. And that I retained  
3 customers and had repeat regular customers that came in to  
4 specifically have a nice time at Kelly's because of me.

5 Q What if anything did you say about the way you treated  
6 customers?

7 A Always politely and courteously.

8 Q Did you say that to Ms. Mitchell?

9 A I said to her I was always courteous and polite to the  
10 guests and never rude or abrupt to them as they could find that  
11 treatment in my co-workers.

12 Q What did Ms. Mitchell reply?

13 A She said that none of that mattered to them. That they  
14 are a small family business and my hurting their feelings  
15 mattered more than my actual job performance.

16 Q What did you say?

17 A I then turned and talked to Ryan a little bit and included  
18 him in the conversation to say that I had made these complaints  
19 and they were never addressed specifically, a lot of them  
20 recently.

21 Q What if anything did you say to Ms. Mitchell regarding  
22 open door?

23 A In that inclusion in Ryan also, I said that I had made  
24 these complaints, there was not an open door policy. My  
25 complaints were literally told they were not going to be heard

1 or treated the way I wanted them to be, in fact reverse what  
2 happened, and I could, should keep them to myself.

3 Q Did you say that to Mrs. Mitchell and Mr. Henry or --

4 A We were still all in the room together.

5 Q What if anything did you specifically say to Mr. Henry?

6 A I told him I did a good job and I worked hard, and I  
7 deserved the shifts that were not being given to me. And I  
8 wanted to make clear that I was again not happy in that there  
9 was constant, a walking on eggshells type atmosphere at work,  
10 never knowing when you would work, if you would work, if your  
11 shift would be -- a consistent Thursday that I would work would  
12 be allotted to a new hire and then finding that out on Saturday  
13 night when I had already made childcare arrangements for three  
14 days later, four days later. It was frustrating. And it was  
15 other people when those things happened it was rotated out to  
16 fit new people in. I told him all of those things. It was I  
17 was frustrated, unhappy regarding the shift issue.

18 Q By people are you referring to bartenders or a different  
19 job classification?

20 A Bartenders.

21 Q What if anything did you say to Mr. Henry about  
22 complaining?

23 A That he knew I had attempted -- voiced my concern to him  
24 that I wanted to talk to Gene about it, that I had complained  
25 to him. He admitted that I complained to him.



1 Q What did he reply?

2 A He told me that my complaint just wasn't answered the way  
3 I wanted and it wasn't going --

4 Q And it what? I'm sorry, the coughing.

5 A Sorry. It wasn't going to be answered the way I wanted.

6 Q What did you say to that?

7 A I think that as the best of my recollection, that was the  
8 end of the conversation.

9 Q What did you do at the end of the conversation?

10 A I turned and left. I turned and left the office.

11 Q What if anything did you indicate to Mr. Henry and Ms.  
12 Mitchell you were going to do?

13 A I just said I was going to go and I went upstairs.

14 Q And did you?

15 A I did. I went upstairs and got my things.

16 Q Who if anyone spoke to you there?

17 A Kris Flood.

18 Q Before you went upstairs, as part of your conversation  
19 with Mr. Henry, what if anything was said about the management  
20 of the restaurant?

21 A When I included Ryan Henry, I told him that I continually  
22 voiced my concerns about how shifts and scheduling were handled  
23 and the general management practices of the restaurant.

24 Q And what if anything was said about stress?

25 A I'm sorry, I don't understand.

1 Q What if anything was said about your stress?

2 A That it was a stressful situation coming to work not  
3 knowing what was happening from one week to the next with the  
4 schedule.

5 Q As far as what?

6 A The schedule and the shifts, and always working at top  
7 performance and always feeling as though you still weren't  
8 going to be treated accordingly.

9 Q Is that what you said to Mr. Henry?

10 A Absolutely.

11 Q You said -- I asked you who if anyone spoke to you  
12 upstairs. You said Kris Flood.

13 A Yes.

14 Q What if anything did Ms. Flood ask you?

15 A I had gone behind the bar to get my things back, my little  
16 wallet that I always have and possibly sunglasses and my car  
17 keys. I had a sweater also behind my register. And she asked  
18 me what I was doing, where are you doing.

19 Q What did you reply?

20 A I said I was just fired so I'm going home.

21 Q What if anything did you tell Ms. Flood about the reason,  
22 any reason, no reason?

23 A I did. I told her that Angie told me that they had  
24 recorded us, that they heard us complaining, and that very  
25 likely she was on those tapes, too, because I wasn't

1 complaining to myself and I wasn't complaining to guests.

2 Q How did Ms. Flood react?

3 A She was visibly shaken.

4 Q What did you do? Did you stay? Did you leave?

5 A I left. I walked out, walked back around the bar and out  
6 the front door.

7 Q Why do you feel you were fired?

8 A For my complaining about the shift scheduling and the  
9 management conditions at work.

10 Q At the time of your discharge, what was the work status of  
11 Sarah Clark?

12 A She was an employee, a bartender at Kelly's.

13 Q What from your knowledge was her upcoming situation to be?

14 A She was graduating. I think she was actually at her  
15 graduation the day I was fired. She was receiving her master's  
16 and she had already vaguely given Kelly's her last day.

17 Q Do you know when her last day was?

18 A To my understanding it was May 17, 2015.

19 Q And the reason?

20 A She's graduating and moving to New York for an editorial  
21 job. That's what she received her master's degree in.

22 Q Thank you.

23 MR. FAYE: May I have a moment, Your Honor?

24 JUDGE CARISSIMI: Yes.

25 MR. FAYE: I'm switching subjects.



1 JUDGE CARISSIMI: Tell me when you're ready, sir.

2 (Off the record.)

3 MR. FAYE: Thank you.

4 BY MR. FAYE:

5 Q What if any service policy did the bar have?

6 A We weren't to serve anyone that was overly intoxicated or  
7 didn't have identification.

8 Q What was the service policy as to tipping?

9 A There was a -- it's a universal policy in that especially  
10 in this high speed type bartending environment majority of what  
11 we did was quick turnover drinks that those that you knew or at  
12 least didn't know and had the possibility of tipping you would  
13 receive the fastest, quickest drink service.

14 Q And those customers that did not tip well?

15 A Would wait until other customers had received drinks that  
16 we knew were going to serve us -- tip us.

17 Q Were they often served last?

18 A Yes.

19 Q Who enforced this policy?

20 A It was boisterously Mike Bevevino.

21 Q How was the policy enforced?

22 A There was often out loud yelling and putting out of guests  
23 that hadn't tip Mike if they came up and ordered drinks from  
24 his section and they didn't tip him from one drink to a large  
25 round of drinks for their friends then Mike would point out

1    them, call out to the other bartenders working don't serve this  
2    guy, he doesn't tip, he gets drinks last. Those type of things  
3    were said out loud to us.

4    Q     When Mr. Bevevino was around how did the -- what was the  
5    way or not the way the bartenders dealt with the policy that  
6    you described?

7    A     Mike was our head bartender and often not the friendliest  
8    co-worker, so I specifically tried to keep my face so that he  
9    wouldn't be outwardly mad or dismissive towards me.

10   Q     When he was around the bartenders, what -- how much  
11   compliance was there with the policy?

12   A     I always served people but when he was, if I was in the  
13   middle section and he was standing right next to me, he could  
14   see me serving the people he just said don't serve, and so he  
15   would often yell at me if I did go to serve them quickly.

16   Q     By don't serve does that mean truly mean don't serve, or  
17   does that mean -- Go ahead.

18   A     I'm sorry, I use that interchangeably. I again never ever  
19   denied service to anyone other than if they were too  
20   intoxicated and then they were usually -- we would tell the  
21   person you can't be served anymore just in the interim until we  
22   told a bouncer. So it would be communicated with the other  
23   bartenders close to you I'm going, I need to flag down a  
24   bouncer, we'd get a flashlight and try to get the bouncer's  
25   attention at the front door and have the person escorted out.

1 So only event where I never served someone was if they were too  
2 intoxicated to be served. When I say don't serve, that means  
3 give good service and I use that interchangeably to mean don't  
4 give good service and to serve them last or slowly.

5 Q When Mr. Bevevino was around, what if any compliance was  
6 there with the policy of serving non-tippers last for the other  
7 bartenders besides you?

8 A I saw other people specifically avoid people that Mike had  
9 called out as non-tippers, I would avoid them and give them  
10 slow service as he told me to do. The only person that didn't  
11 seem at all fazed by Mike and his attitude on that was Kathy.

12 Q What's her last name?

13 A Karter.

14 Q That's with a K, Kathy with a K, and K with Karter?

15 A Yes, two Ks.

16 Q She was a bartender?

17 A She was or is, I don't know.

18 Q How frequently did Kathy Karter work?

19 A I regularly worked with Kathy on Saturday nights. She had  
20 a -- her standing schedule was Wednesday during the day and  
21 Saturday night.

22 Q What was the policy if any towards a customer named  
23 Klingert, K-L-I-N-G-E-R-T?

24 A There was a specific incident where I first met Klingert.  
25 He had a large round. He didn't tip on that large round and



1 Mike pointed him out. He pointed, he said his name to all of  
2 us very loudly, Klingert doesn't get any more drinks. Klingert  
3 came back up later and I went to serve him, Mike wasn't happy  
4 about it, but he wasn't denied service. It was like don't  
5 serve this guy, which meant don't give him good service. And  
6 any time Mike got his credit card after that, he always -- he  
7 pointed it out. Klingert was a repeat customer. He was a  
8 Villanova University student. He came in regularly with his  
9 friends.

10 Q Is that his last name?

11 A Klingert was his last name. I don't --

12 Q Do you know his first name?

13 A I only know his last name because it happened often. Mike  
14 remembered his name. He couldn't remember what the kid looked  
15 like, but every time he got his credit card he would point out  
16 that Klingert is here again.

17 Q How did Mr. Bevevino act towards you as far as serving  
18 customers that did not tip or did not tip well?

19 A He would be a little displeased. He was not happy about  
20 it. He was very displeased, very honestly. He didn't like  
21 that I would serve people that he told me not to. There was a  
22 couple of instances where the kids were nice. I mean they were  
23 just college kids and some of them just didn't have money to  
24 tip, but they wanted to go out with their friends, and I was  
25 sympathetic to that. I didn't think that they were -- it

1 wasn't worth it to be mean to them over 50 cents or \$1. It  
2 wasn't worth me being upset about it, so I often wasn't. I  
3 didn't let his policy too much affect me.

4 Q What was the service policy as to a particular sorority  
5 girl?

6 A She was on the list of do not serve, which was serve last.

7 Q Because?

8 A She was a habitual line through the tip, just like  
9 Klingert. I just don't remember her name. It wasn't as  
10 pronounced to me as Klingert's was and she never ran a tab.  
11 She would get one drink at a time.

12 Q What policy was there as to a particular football player?

13 A There was a tall redheaded football player that Mike  
14 absolutely did not like either. And always paid in cash,  
15 never, never tipped. But he was nice. He was just a college  
16 kid. He often borrowed money from his friends.

17 Q What was the service policy for him?

18 A Mike did not want him served quickly, either. He was  
19 another person on the list to get poor service.

20 Q What if anything did you tell Mr. Bevevino regarding  
21 serving non-tippers?

22 A That it was our job, you know, that some of them --

23 Q Your job to what?

24 A It was our job to serve them. It was our job to get them  
25 drinks and it couldn't be completely avoided. And so sometimes

1 I was serving someone but I served three people before them and  
2 didn't go right to them, and he didn't always know exactly the  
3 order of things happening in my section versus his, and he  
4 sometimes projected his policy on me, when in fact I was doing  
5 what he wanted but I still had to serve them. It was still  
6 going to happen. I wasn't -- these kids were nice, most of  
7 them were nice.

8 Q Did you follow his service policy?

9 A In that I didn't want to be called out in front of  
10 everyone like he was calling out the kids.

11 JUDGE CARISSIMI: Go ahead, finish your answer, then I  
12 have a question.

13 THE WITNESS: I don't even know what I was asking at this  
14 point, you can go.

15 JUDGE CARISSIMI: What's the relevance of the tipping  
16 policy?

17 MR. FAYE: It's tied in with the defense, one of the  
18 defenses of Respondent.

19 JUDGE CARISSIMI: All right. So there was no objection  
20 but I'm just curious, it's anticipatory to defenses that were  
21 raised during investigation of this case, is that correct?

22 MR. FAYE: It is, other than tangentially of course that  
23 the tipping is tied in with the frequency of dealing with the  
24 shifts she worked, of course. Other than that it's mostly  
25 because of the anticipatory defense.



1 JUDGE CARISSIMI: Again, I have no objection, but I just  
2 -- sometimes just because somebody doesn't object doesn't mean  
3 it's relevant so I thought it was time for me, since we're  
4 spending a little time which is fine, but I thought I better  
5 ask now what this is about. Now I understand. You may  
6 proceed.

7 MR. FAYE: I do understand, Your Honor, believe me.

8 BY MR. FAYE:

9 Q About three months before your discharge, did you and Ms.  
10 Mitchell and Mr. Mitchell have a conversation about tipping?

11 A We did.

12 Q Where?

13 A I was behind the bar. Gene was on the other side of the  
14 bar sitting down close to the service area of the main bar.

15 Q And Ms. Mitchell?

16 A Sitting down, not sitting, the majority of the  
17 conversation took place between Gene and I.

18 Q What did Mr. and Ms. Mitchell mention to you?

19 A They were talking about two of our regular guests, Tony  
20 and Beth.

21 Q What is the relationship of Tony and Beth to Mr. and Ms.  
22 Mitchell?

23 A Tony and Beth were regular customers. They seemed  
24 friendly with Gene and Angie. They often would spend time  
25 together when they were both there, when all four of them or

1 any number of them there at the same time, they would chat. My  
2 understanding, Tony was in some way employed by them, and I  
3 don't understand in which way, years ago.

4 Q What if anything did you say to Mr. and Ms. Mitchell about  
5 the friends, Tony and Beth?

6 A Gene asked me about them as guests and I said that I  
7 enjoyed talking with them, that they were there every day.  
8 Every day, they were there 95 percent of the days that I  
9 worked, I saw them.

10 Q What if anything did you tell Mr. and Ms. Mitchell  
11 regarding what Mr. Bevevino said about Tony and Beth?

12 A Tony and Beth were on Mike's do not serve, serve last,  
13 give poor service list, too. They did not, in his opinion,  
14 from what he told me, tip proportionately to what their bill  
15 should be and so they shouldn't have us talk to them on a  
16 regular basis, we shouldn't engage them because all it does is  
17 it encourages their poor behavior is what he told me.

18 Q What if anything did you impress regarding what you just  
19 repeated to Mr. and Ms. Mitchell in this conversation?

20 A That I didn't have a problem with the way they tipped at  
21 all, that every bar has its place for regular customers. Them  
22 coming in frequently gave me someone to chat with. They also  
23 encouraged other people to sit down. A lot of times an empty  
24 bar isn't very welcoming for other people to walk into, so I  
25 felt that there was a place for Tony and Beth and that they

1 were no problem. They were never demanding, needy. They just  
2 -- she drank Coors Light, he drank Absolut and club soda, and  
3 they just came in and at there and minded their own business  
4 mostly.

5 Q The remarks you said that Mr. Bevevino said to you, did  
6 you tell -- what if anything did you tell Mr. and Ms. Mitchell  
7 about Mike Bevevino's viewpoint or directions regarding service  
8 for Tony and Beth?

9 A It came up because this was following the Super Bowl party  
10 and there was a conversation about them not tipping at the  
11 Super Bowl party. And he wanted to know what was happening at  
12 Kelly's when they came in.

13 Q He meaning Mr. Mitchell?

14 A Gene. Gene, right, Mr. Mitchell.

15 Q Go ahead. What did you tell --

16 A I told him about Mike avoiding them, never engaging them,  
17 Mike telling us to try to get their drinks before we left the  
18 bar area so that he didn't have to engage them at all.  
19 Whenever there was more than one person working, he -- and Mike  
20 always took his break every night at the same time. He'd leave  
21 at the same time. So if we had to run and do something --

22 Q Well, did you tell Mr. and Ms. Mitchell the reason for Mr.  
23 Bevevino's policy?

24 A The reason for the policy in that he didn't tip?  
25 Absolutely, yes. Yes, I did.



1 Q How did Mr. Bevevino generally treat customers?

2 A Rudely and very -- he did not engage them at all.

3 Q In early 2015, did you have a conversation with Chelsea  
4 Heyward, H-E-Y-W-A-R-D, about the service policy?

5 A I did.

6 Q Who is Chelsea Heyward?

7 A She was a co-bartender my last few weeks at Kelly's.

8 Q What if anything happened to Ms. Heyward's employment?

9 A She found a different job and quit.

10 Q In what time frame compared to your discharge?

11 A I am not clear as to whether she worked that weekend that  
12 I was fired or she stopped working the weekend before. I don't  
13 really know. I don't think I had seen her yet that week, so I  
14 don't know if she was still technically there or not.

15 Q She left around the same time as you?

16 A The weekend before or the weekend that I was fired was her  
17 last day, I think.

18 Q What if any reason did Chelsea Heyward give you for her  
19 quitting?

20 A She said that the kids were rough and she needed  
21 consistency in making more money.

22 Q Is the kids a reference to customers as opposed to  
23 co-workers?

24 A Yes, the college kids, sorry. I always refer to them as  
25 the kids. To me now in my mid-30s they are kids, so --

1 Q I'm 61 and may refer to you as a kid.

2 A Right. So when I say the kids, I'm talking about the  
3 Villanova students.

4 Q Thank you.

5 A Sometimes other universities but primarily Villanova  
6 students.

7 Q Right. Did you ever work with Chelsea Heyward?

8 A I did.

9 Q Who if anyone did you not serve at all when you worked  
10 with Ms. Heyward?

11 A No one.

12 Q Who if anyone did you serve last with Ms. Heyward?

13 A I couldn't specifically tell you. We would all work  
14 together, so I can't tell you if it was someone that was  
15 supposed to be necessarily served by me that was -- I don't  
16 know.

17 Q What if any involvement did you have with Ms. Heyward's  
18 training?

19 A I trained her, her second night of training at Kelly's.

20 Q Her second night of employment?

21 A Her second training shift. She wasn't a full bartender at  
22 that point. She was still in training.

23 Q What if anything did you explain to Ms. Heyward regarding  
24 the service policy?

25 A We discussed the volume that happened at Kelly's and just

1 the general nature of what a shift looked like. And we talked  
2 about how since we are quick turnover, high volume, that it's a  
3 lot of the service happens based on who we know tips or at  
4 least has a possibility to tip rather than going quickly to  
5 non-tippers.

6 Q What if anything did you say about tipping -- serving  
7 last?

8 A That everyone gets served but it's just a matter of in  
9 what order.

10 Q What if anything did you say to Ms. Heyward about what the  
11 policy was?

12 A That they got slower service or were served last.

13 Q What did Ms. Heyward say to you about that?

14 A She said absolutely, she's worked in this kind of speed  
15 bartending in the past, and that that's the universal rule.  
16 You have to may get it or at least have a chance of getting it.

17 Q What if anything did Ms. Heyward tell you about the  
18 students tipping?

19 A After her first night, she -- I think after her first  
20 night I --

21 Q To the best of your recollection.

22 A I think I worked downstairs with her and she said these  
23 kids are great, it was fine. Her second night, she said the  
24 kids were rude, they didn't tip well, and it was completely  
25 miserable.



1 Q After her second training night who if anyone did Ms.  
2 Heyward make these remarks to?

3 A Well, during her second training night she asked me -- she  
4 said that she had received some information from Sarah and she  
5 asked me to confirm it, give her my feedback about management  
6 and shifts.

7 Q Did she say what information she got from Sarah?

8 A She said from Sarah, she said that she got information  
9 that basically a lot of mismanagement, regarding mismanagement.  
10 Chelsea noted some complaints specifically about Angie and that  
11 the shifts were not allotted well, and that there were general  
12 complaints from everyone about the shifts and the scheduling.

13 Q Was she confirming with you?

14 A She said that a single mother that she needed a consistent  
15 schedule with consistent shifts in order to support her son and  
16 that she knew, because we had chatted a little bit, you know,  
17 me being a mother, what would I say to her as far as stay or  
18 go.

19 Q What if anything did you and other employees say that you  
20 know to Ms. Heyward regarding the schedules and shifts at  
21 Kelsey's -- Kelly's?

22 A I told her that I would definitely agree with Sarah that  
23 shifts and scheduling were an issue, they were a consistent  
24 issue, and that that was all I was going to, as far as confirm  
25 with her. I didn't go on to confirm the complaints about Gene

1 and Angie.

2 Q What did Ms. Heyward reply to you?

3 A She thanked me for being honest because she's a mother and  
4 she wanted to make sure that she was able to provide for her  
5 son. And if she couldn't do that by making consistent, mostly  
6 consistent money, she needed to find a job that would do that  
7 for her.

8 Q What if anything did she say about Sarah Clark?

9 A In reference to what? I'm sorry.

10 Q To the scheduling.

11 A Just that Sarah had brought it up to her and she asked me  
12 to confirm.

13 Q Brought up what to her?

14 A The scheduling and shift issues.

15 Q I'm sorry to repeat this but I want to make this clear.

16 You said on the -- after the --

17 JUDGE CARISSIMI: Don't tell me what the witness said,  
18 just ask your question, Mr. Faye.

19 MR. FAYE: Yes.

20 BY MR. FAYE:

21 Q I just want to go back to what Ms. Heyward said or who she  
22 spoke to after her second night of training regarding students.

23 A It was at the end of the night as we were all cleaning up.  
24 So unless someone was grabbing beer, I'd say the majority of  
25 the bar staff that was all working and scheduled that night was

1 there, the bar back, the bouncers. So it was pretty much  
2 anyone that would have been scheduled that night would have  
3 been there. The lights were on. We were cleaning up. We  
4 weren't done yet for the night. And she said I think before  
5 banks were even counted she was making that claim.

6 Q What did she say about them?

7 A That they were rude, and didn't tip well.

8 Q Thank you. I'd like to show you what I have marked as  
9 General Counsel Exhibit 2.

10 Can you please identify for the record, this document  
11 marked General Counsel Exhibit 2.

12 (General Counsel's GC-2 identified.)

13 A It was an email I received from Gene Mitchell.

14 Q And it indicates you are one of several people who got it?

15 A We all worked that night. Those were the bartenders that  
16 were all working that night.

17 Q Was this about a customer complaint and it's dated  
18 February 15, 2015, correct?

19 A Yes.

20 MR. FAYE: I move this into evidence.

21 JUDGE CARISSIMI: Is there any objection to General  
22 Counsel Exhibit 2?

23 MR. SCHADLER: Not at this time, no.

24 JUDGE CARISSIMI: General Counsel's exhibit two is  
25 admitted.



1 (General Counsel's GC-2 received.)

2 BY MR. FAYE:

3 Q Who is the blonde bartender referred to herein in this  
4 document?

5 A Sarah Clark.

6 Q Was Sarah Clark disciplined?

7 A To my knowledge, no.

8 Q What if any award did Sarah Clark receive from the  
9 Employer?

10 A Employee of the year.

11 Q Is that an award from Kelly's or is that an award from all  
12 three facilities of Mid-Atlantic?

13 MR. SCHADLER: Objection. Relevancy, at this point, Your  
14 Honor. I understand where they're going originally, but now  
15 we've gone far beyond any relevant material as far as relating  
16 to this issue. It will come up.

17 JUDGE CARISSIMI: What is the relevance of Ms. Clark  
18 receiving awards?

19 THE WITNESS: Do I say?

20 JUDGE CARISSIMI: No, I'm asking.

21 MR. FAYE: She was engaged in complaining about the shifts  
22 as well as Charging Party but there were some differences in  
23 the time frame namely that she had been this award winner and  
24 she -- there's reasons why Respondent may not have treated Ms.  
25 Clark and one may be tied to the fact that she had received

1 this award.

2 JUDGE CARISSIMI: All right, I don't need you to go  
3 further. I'm going to overrule the objection. I'll allow the  
4 question. Ms. Helms, how do you know that it was Sarah Clark  
5 referred to in this exhibit, General Counsel 2?

6 THE WITNESS: It was at the end of the night. At the end  
7 of the night, it generally happened just as Chelsea was  
8 complaining about not liking the kids after her second night We  
9 all talked about -- there was often mention of big events that  
10 had happened, someone passed out, they were taken out on a  
11 stretcher. This, Sara referenced it that night. At the end of  
12 the night closing up, I received this the next morning. As we  
13 were closing, Sarah said that she said that to him.

14 JUDGE CARISSIMI: When did Sarah tell you that she said  
15 this to the customer?

16 THE WITNESS: She said it as we were cleaning up at the  
17 end of the night while we were wiping the bar down, restocking.  
18 As I was walking down the steps from upstairs, I worked  
19 upstairs that night. I wasn't behind this bar, so it was only  
20 -- I was told this happened, she said that this interaction  
21 happened, that she told him all these things exactly as he  
22 wrote in the email.

23 JUDGE CARISSIMI: All right. You may continue, Mr. Faye.

24 BY MR. FAYE:

25 Q My question that you didn't answer because of the

1 objection was whether the award, was it a Kelly's award or was  
2 it a Kelly's/Flip & Bailey's/Ale House award?

3 A It was all three. The employee of the year was chosen  
4 among all employees employed by Gene and Angie.

5 Q When was this awarded?

6 A At the Super Bowl party. It was early February 2015, so  
7 just a few weeks.

8 Q Were the bartenders tips pooled or not pooled for the  
9 Employer?

10 A They were pooled tips.

11 Q And are the tips then broken out or not broken out on the  
12 basis of how many hours the bartender worked?

13 A They are divvied up hourly.

14 Q Thank you.

15 MR. FAYE: I don't have any more. My understanding was  
16 that General Counsel Exhibit 2 has been admitted into evidence?

17 JUDGE CARISSIMI: That's correct.

18 MR. FAYE: Yeah, so with that being said, I don't have any  
19 more questions at this time, Your Honor.

20 JUDGE CARISSIMI: Very good. We're going to take a 10  
21 minute recess. Is that enough time for you to prepare for your  
22 cross-examination, Mr. Schadler?

23 MR. SCHADLER: Yes, Your Honor.

24 JUDGE CARISSIMI: We'll be in recess for 10 minutes.

25 (Off the record.)



1 JUDGE CARISSIMI: Mr. Schadler, you may cross-examine.

2 MR. SCHADLER: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. SCHADLER:

5 Q I'd like to go back and get some more information.

6 Speaking first about you said you had complained about the  
7 shift scheduling. You had said that you had raised specific or  
8 -- actually, strike that. I apologize. If you could please  
9 talk to me about the shift scheduling as it pertains to the  
10 sporadic nature of scheduling. What specifically were your  
11 problems and complaints with the sporadic nature of scheduling?

12 A I would consider that I worked Thursday, Friday, and  
13 Saturday. As was brought over or brought onto Kelly's to give  
14 them shift, I often lost Thursday. And that was explained to  
15 me that it wasn't going to be just me and that it would happen  
16 to other people also. So one Thursday I would be scheduled to  
17 lose it. The next Thursday, Kris would have to give it up.  
18 That's the way it was explained to me as far as what that loss  
19 of shift was.

20 MR. FAYE: I have a point of information because the name  
21 Kris was used, if we could note if it's Kris --

22 JUDGE CARISSIMI: Yeah, if you can remember last names.

23 THE WITNESS: Sure, sorry about that, Kris Flood.

24 BY MR. SCHADLER:

25 Q You had said that one of the issues you had -- strike

1 that. I apologize. One of the issues is you said that the  
2 shift is scheduled on Saturday. Do you recall that portion of  
3 your testimony?

4 A I'm sorry. What?

5 Q Shifts came out on a Saturday, correct?

6 A Emails came out on Saturday.

7 Q Yes.

8 A Correct.

9 Q The shift came out for the next week.

10 A Towards the end, yes, that's when it started to come out  
11 on Saturdays.

12 Q And one of the concerns you had was the shifts not being a  
13 set shift schedule, correct? You didn't set a shift schedule,  
14 correct?

15 A Really, I'm not trying to be difficult. I just don't  
16 understand your question.

17 Q One of the complaints you had was that the shift schedule  
18 was sporadic, correct?

19 A Sporadic, not consistent, yes.

20 Q Not consistent. And you had childcare to worry about,  
21 correct?

22 A Correct.

23 Q And you had other issues to worry about, correct?

24 A Yes.

25 Q And you would not know from week to week when you were

1 scheduled until Saturday night?

2 A Correct.

3 Q And there was no consistency to it?

4 A Oftentimes, yes.

5 Q Oftentimes no consistency. When you say oftentimes, what  
6 do you mean oftentimes?

7 A When there was an issue towards the end of Kristin Lang's  
8 management time there, there was a few weeks when it was not  
9 working out too well as far as shifts were not consistent and  
10 then again at the end as these new hires were happening and we  
11 were coming towards the end of my employment.

12 Q What do you mean not consistent? Explain to me not  
13 consistent.

14 A Do you want an example?

15 Q Just explain to me what you mean by not consistent.

16 A That I had worked on Thursdays. I had not done anything  
17 to lose a Thursday. And they would hire someone new and then  
18 put them in my place on a Thursday. So that wasn't consistent  
19 to me because I had done nothing to alter my behavior, but they  
20 chose to change my schedule. So that to me wasn't consistent.  
21 I was consistent in my performance. What they had given back  
22 to me wasn't consistent from them.

23 Q When did that take place?

24 A Several times throughout my employment.

25 Q When?



1 A Hiring of someone named Scott.

2 Q When was that, dates please?

3 A I don't know specifically.

4 Q General time frame?

5 A January/February of 2015, I can say to the best of my  
6 recollection.

7 Q So you're saying in January/February '15, Scott was hired?

8 A I only met Scott once so he doesn't stick out very  
9 prominently to me, so I can't --

10 Q Approximate January/February, correct?

11 A I will say yes. I can't -- I really --

12 JUDGE CARISSIMI: Just do the best you can.

13 BY MR. SCHADLER:

14 Q The best of your recollection, when was he hired? The  
15 best of your recollection -- I'll strike the question. When  
16 were these schedules, that's what I want ironed out.

17 A Do you want an example of one?

18 Q No. I'd like to know, you said I have problems with  
19 inconsistent shift scheduling. I'd like to know when that  
20 inconsistent shift scheduling took place.

21 A It happened again with Troy, when Troy was moved over.

22 Q When was that?

23 A Beginning of April, end of March 2015.

24 Q So January/February, April, March/April. So January  
25 through April?

1 A No, it was only -- inconsistencies happened specifically  
2 when other people were brought over.

3 Q When was that?

4 A I'm telling you it happened with Troy.

5 Q If you would be kind enough to give me dates, not names,  
6 I'd appreciate that.

7 JUDGE CARISSIMI: Well, how am I going to determine what  
8 these are unless I have some basepoint? So the names are fine.  
9 But the dates and the names are important to the extent you can  
10 recall.

11 THE WITNESS: Sure. Over from the Ale House, late March,  
12 April, from the best of my recollection.

13 BY MR. SCHADLER:

14 Q Best of your recollection, March to April. And you said  
15 Scott. He was best of your recollection January/February?

16 A Okay, yes.

17 Q And these times that they were brought over you  
18 experienced inconsistencies in your shift schedule?

19 A Yes. There was another time.

20 Q Okay, another time, please.

21 A It was with Joe Fairley.

22 Q When was that?

23 A October/November, to the best of my recollection.

24 Q October/November of '14?

25 A Correct. That was under Kristin Lang's Supervision.

1 Q So far we have inconsistencies October, November, '14,  
2 none in December, January of '15, February of '15 --

3 A No, it was only once with Scott. I was taken off. He was  
4 put on. It only happened one time. So it happened either  
5 January -- it wasn't two different occasions. It was --

6 Q One time, January/February.

7 A Yes.

8 Q And March and April?

9 A No, March it happened only -- it happened with Troy  
10 specifically that I can remember on a Thursday.

11 Q So what you're saying is you lost one -- I'm just trying  
12 to understand what you're telling me. You lost one Thursday in  
13 February and March -- January/February and one Thursday in  
14 March. Is that what you're telling me?

15 A I'm sorry?

16 Q Let me understand your testimony.

17 A Yes, I'm trying to --

18 Q You lost one Thursday in January or February of '15.

19 A We're talking about Scott. Is that what you're  
20 referencing?

21 A I'm referencing when you lost a shift schedule. You lost  
22 one shift schedule because of Scott in January/February of '15.

23 A Yes.

24 Q You lost one shift schedule on Thursday because of Troy in  
25 March and April or April of '15, correct?



1 A Yes.

2 Q And you lost one scheduled Thursday in October or November  
3 of '14 because of shift scheduling?

4 A It was more than one specific incident related to Joe  
5 Fairley and Mike Selino.

6 Q That was the October/November?

7 A That was around October, November, December.

8 Q How many would you say there, ballpark? Give me an  
9 estimation, how many do you think you lost? Two? Three?  
10 Five? Six?

11 A Two or three.

12 Q Two or three. So two or three Thursdays that you lost in  
13 November, October/November; one in January and March, and  
14 another one either in March and April, is that correct?

15 A And then there was also if I'm recalling this correctly  
16 there was an incident with John when he came over also.

17 Q When was that?

18 A Um?

19 Q John who, by the way?

20 A I don't know his last name. I didn't work with him very  
21 much. He also worked at the Ale House. He was one of the --  
22 he was the employee I referenced that Kris had to train over  
23 there that she then lost her shift to.

24 Q Okay, and you don't know his name, but you lost --

25 A From what she told me.

1 Q -- a shift to him when?

2 A That should have been in February/March.

3 Q So you lost two in February/March, I'm sorry, two -- then  
4 two in February/March. You're talking this is a different one  
5 than the January/February one, correct?

6 A There was one, two -- there was an incident with John.  
7 There was an incident with Scott. There was an incident with  
8 Troy. And there were the incidents with Mike Selino and Joe  
9 Fairley that happened in 2014.

10 Q So anywhere from -- you're looking at four to six?

11 A Okay.

12 Q Four to six Thursdays. Any other inconsistencies with the  
13 schedule, that you were concerned about?

14 A Start times.

15 Q Start times? What was your concern with start times?

16 A I was generally happy with them with the beginning of my  
17 employment. I was not a senior employee. I had not done  
18 anything to earn good shifts. I was concerned with them  
19 towards the end especially as Mike left because I, at that  
20 point, had done a lot of favors. I had been helpful. I had  
21 been available. I had done almost everything the Employer had  
22 asked me to do as far as picking something up when it was last  
23 minute, helping out as much as I could, and I wanted to make  
24 sure that that had earned me the better, more lucrative shifts.

25 Q So you were concerned about your shifts towards April --

1 March, April, May of '15, is what you're saying? That was the  
2 frame that Mike was leaving.

3 A Yes, that's what we had talked to Ryan about.

4 Q And you had talked to Ryan about your concerns about your  
5 shifts and your scheduling, correct?

6 A Yes, I had.

7 Q Now the no tip policy, whose policy was that?

8 A It's pretty universal.

9 Q It was universal. And that was the policy regarding you  
10 don't tip people -- you don't serve people that don't tip. You  
11 serve them in a manner that is not as prompt as others,  
12 correct?

13 A When there is a bunch of people at the bar and Sally comes  
14 up, and I'm only going to use that name because I really don't  
15 know how to explain this so that we all understand what I'm  
16 talking about. Sally comes up and a second later Joe comes up,  
17 and Sally is a habitual, I know her. She is someone that  
18 doesn't tip. But Joe is new. I never met Joe before so I have  
19 a possibility of Joe tipping us or not tipping. I go to Joe.  
20 Probably, as far as service goes, if both being equal and I had  
21 no background knowledge about Sally, I would have gone to Sally  
22 first.

23 Q My question is the policy. Where was the policy? Was the  
24 policy with Gene and Angie?

25 A No, it was verbal.



1 Q It was a verbal policy. Did Gene and Angie tell you this  
2 policy?

3 A No.

4 Q Did Gene and Angie talk about the policy?

5 A They made a comment about when I told them about Tony and  
6 Beth.

7 Q So they adopted the policy in this policy I this  
8 conversation?

9 A Not at all, no.

10 Q Did they acquiesce to the policy during this conversation?

11 A No.

12 Q So you're telling me that there is no information you can  
13 provide that Gene and Angie were aware of the policy.

14 A The policy that Mike did not want us to give --

15 Q That's correct.

16 A Other than we had a conversation about it. They knew that  
17 he did that.

18 Q So you're saying you told them specifically and they did  
19 nothing about it?

20 A I don't know if they did anything about it. To my  
21 knowledge they didn't. Mike's behavior didn't change. He  
22 didn't start.

23 Q The next point I want to talk about, I'm just going to  
24 briefly go through some things is asking off. You said that if  
25 you asked off -- there was a conversation I want to

1 specifically talk about is bringing your attention to asking  
2 off. You said if you ask off, if I ask this correctly, if you  
3 asked off, you got in trouble.

4 A In trouble?

5 Q Yes.

6 A I don't think I specifically said trouble.

7 Q Were you retaliated against if you got asked off? If you  
8 asked off for a shift what happened? Explain that to me.

9 A I didn't -- I don't think I made a practice to ask off.  
10 This was a general feeling and it wasn't something that I felt  
11 ever happened to me.

12 MR. FAYE: Your Honor, I don't remember any testimony on  
13 direct about asking off.

14 JUDGE CARISSIMI: Well, that's why I don't let lawyers ask  
15 questions, in other words there will be a transcript and  
16 whether there was a question or not, we'll see. Counsel has a  
17 question. It's within the scope of the direct examination  
18 generally so I'm going to overrule the objection.

19 MR. FAYE: I was going to say beyond the scope, but I  
20 understand your ruling.

21 BY MR. SCHADLER:

22 Q Was there retaliation for asking off? And I believe it  
23 came up in the context of a dishwasher.

24 JUDGE CARISSIMI: Well, you asked a question and then the  
25 witness was thinking about answering yes or no. Sir, you have

1 to let the witness answer her question.

2 THE WITNESS: In reference to the dishwasher, I'm sorry, I  
3 was thinking about something else as far as concerning  
4 bartenders so that's where I was going with it. I'm sorry, so  
5 what specifically do you want? I'm sorry, I don't understand.

6 BY MR. SCHADLER:

7 Q Was there asking for time off and I'd like to draw your  
8 attention specifically to any comment about a dishwasher.

9 A What Ryan told me was that there was retaliation in that  
10 instance, yes.

11 Q So employees were retaliated against for asking for a day  
12 off or asking for time off?

13 A He asked for a change in his schedule and Ryan explained  
14 -- the way it was explained to me it was inconvenient and it  
15 made Gene angry and so that was his retaliation.

16 JUDGE CARISSIMI: So the change in schedule made Gene  
17 angry?

18 THE WITNESS: From what it was communicated to me.

19 BY MR. SCHADLER:

20 Q I'm going to touch on this again. We're going to go back  
21 to this but I want to briefly make sure I have some points  
22 correct. This is about the meeting where you're terminated,  
23 correct?

24 A Yes.

25 Q Did that fully encompass everything said at the meeting,



1 to the best of your recollection?

2 A To the best of my recollection, yes.

3 Q You had said earlier also, specifically stated that you  
4 were sympathetic and my apologies, Your Honor, the kids with no  
5 money, sympathetic to them?

6 A Specifically what did I say in reference to --

7 JUDGE CARISSIMI: You're being asked a question. Just  
8 answer the question.

9 BY MR. SCHADLER:

10 Q College kids with no money.

11 A Yes.

12 Q Specifically, sympathetic to them about tipping?

13 A Particularly the friendly kids, yes.

14 Q And that you didn't want to penalize them because they had  
15 no money?

16 A Yes.

17 Q As far as that went with the no tipping policy, you were  
18 sympathetic to kids that had no money as it pertains to the no  
19 tipping policy, but that was frowned down upon by management,  
20 specifically Mike.

21 A Mike wasn't the manager.

22 Q Well, head bartender.

23 A Head bartender, yes.

24 Q And that was frowned upon by him?

25 A Yes.

1 Q Now the other person you had said -- give me one second.  
2 Let's go back through some of this. First off you mentioned a  
3 lot of names in your direct. A lot of them are bartenders. Do  
4 you have their cell phone numbers?

5 A Yes.

6 Q Do you have their email?

7 A I think I should have a majority of their contact  
8 information.

9 Q Do you have a cell phone?

10 A I do.

11 Q What kind of cell phone do you have?

12 A It's an iPhone.

13 Q iPhone. And how long have you had that iPhone?

14 A Before I started working at Kelly's.

15 Q So you have the same iPhone from when you started working  
16 at Kelly's to today, correct?

17 A Yes.

18 Q And in that do you have email contacts for people?

19 A Probably the majority list I would think that if they are  
20 group emails I would think that they are there.

21 Q Do you have cell phone numbers for people?

22 A Some, not all.

23 Q Not all. Do you have cell phone numbers for the  
24 bartenders you mentioned?

25 A I don't know that I have Chris Healy's phone number.

1 Q Do you have Kristin Lang's?

2 A I do.

3 Q Do you have Kris Flood?

4 A I do.

5 Q Do you have Mike Bevevino?

6 A Possibly not.

7 Q Do you have Sarah Clark?

8 A Yes.

9 Q Who else do you remember having, anyone that I haven't  
10 mentioned?

11 A At the time of my employment and theirs, those are the  
12 numbers I have. So while I worked there and I probably have  
13 the number that Joe Fairley had while he worked there. I can't  
14 remember specifically whose number I do or don't have  
15 otherwise.

16 Q These were individuals that you had communicated with  
17 during your time there, correct?

18 A Yes.

19 Q Bartenders you met up with either at work or perhaps out  
20 socially?

21 A Never out -- I don't think ever out socially. I can't say  
22 never, but I don't recall a time when I ever met them out  
23 socially.

24 Q Did you email these bartenders about shift issues?

25 A Not that I recall.

1 Q Do you email them -- did you correspond with them over  
2 texts about anything? Did you text with other bartenders?

3 A Yes.

4 Q Did you email with other bartenders?

5 A I don't know that I emailed with them. I can't -- I  
6 couldn't tell you that I specifically had back and forth. I  
7 mean I would text, but I don't remember specifically emailing  
8 anybody.

9 Q Did you have phone calls with them ever? Ever call to  
10 talk them on the phone?

11 A Yes.

12 Q Your testimony was that the complaints --

13 JUDGE CARISSIMI: Your testimony was, ask your question.

14 MR. SCHADLER: You'll have to forgive me, Your Honor, it's  
15 a very -- it's a habit I'm used to.

16 BY MR. SCHADLER:

17 Q Specifically, there was pervasive anger about the shift  
18 scheduling and about how Gene and Angie behaved, correct?

19 A Frustration.

20 Q Complaints?

21 A Yes.

22 Q People were upset?

23 A Yes.

24 Q Bartenders were upset?

25 A Yes.



1 Q Bartenders like the individuals you had in your phone,  
2 correct?

3 A Correct.

4 Q And these individuals are individuals you would  
5 communicate with via text, correct?

6 A Yes.

7 Q So over texts and over phone calls, correct?

8 A Yes.

9 Q And certainly these are individuals that would remember  
10 such a pervasive and angering time, correct?

11 A Yes.

12 Q These are individuals that you still have the contact  
13 information for, correct?

14 A I have the contact information I had when I worked there.  
15 I haven't talked to them --

16 Q I'm sorry. Right as you said that, that air conditioner  
17 kicked on.

18 A That's the contact information I had when I still worked  
19 there. I have had very limited contact with anybody since I  
20 was fired.

21 Q Since you were fired.

22 A Yes.

23 Q When you were fired, you immediately recognized you were  
24 fired for complaining?

25 A Yes.

1 Q And did you reach out to other employees and talk about  
2 it?

3 A I talked to Sarah Clark that night.

4 Q You talked to Sarah Clark that night. Did you text with  
5 any employees?

6 A Current employees?

7 Q Any employees.

8 A Yes.

9 Q Did you text them and say, hey, I just got fired for  
10 complaining about everything we talked about?

11 A The only person I texted was Sarah Clark. I think I  
12 texted with Sarah. I know we talked. So I know she was at  
13 graduation. I don't remember the -- the chat was a little bit  
14 later so I don't remember how the conversation happened.

15 Q Did you say to them, hey, I raised all these issues and  
16 I'm the one getting fired?

17 A Yes.

18 Q And you said that to them.

19 A I think that that was part of my conversation with Sarah.

20 Q Did you follow-up with an email to anyone and say that?

21 A No.

22 Q These were people that you had your email -- they had  
23 their email -- they had your email obviously.

24 A Right.

25 Q They had your cell phone number.

1 A Yes.

2 Q Are these individuals that you reached out to afterwards  
3 and said, hey, something is not right here, it didn't happen  
4 the right way I would like you to write me an email confirming  
5 that this is what happened?

6 A No.

7 Q You didn't write a text message confirming what happened?

8 A To ask them to confirm what happened?

9 Q Hey, this is what happened, you know, you were aware of  
10 this.

11 A Those that I talked to generally about this was Kris Flood  
12 and Sarah Clark. Do you mean talk -- I'm sorry.

13 Q No, you're fine.

14 A So majority of the conversations were between Sarah Clark,  
15 and Kris Flood, and myself.

16 Q You didn't text them afterwards?

17 A I did not have much -- I don't think I talked to Sarah --  
18 Kris ever again after that day.

19 Q After all this you had been through for them.

20 A Yep.

21 Q After all you'd done, just that was it?

22 A When Angie told me that I was the one getting fired and  
23 Gene had considered firing everybody, I figured I was the one  
24 that was going to be shown a lesson of and so this would get  
25 their behavior in line. So I didn't want to jeopardize -- Kris

1 Flood has six kids. I didn't want to jeopardize her losing her  
2 home, the car she bought that day, or anything else by her  
3 trying to -- I didn't want my friend to try to take my side in  
4 this and lose her job over it. So I did not contact her or  
5 talk to her again.

6 Q What you're saying is, is that you were such a benevolent,  
7 kind and good hearted worker that you took the bullet for  
8 everyone?

9 A I didn't offer myself, but I most certainly didn't throw  
10 anyone under the bus when I was in there.

11 Q Let me ask my question. Your thought process was I am  
12 going to be the good hearted person to everyone and I'm going  
13 to take the bullet.

14 A I wouldn't paint myself that way.

15 Q Then how would you paint yourself? You just got fired --  
16 let me ask you this question. How would you paint yourself?

17 JUDGE CARISSIMI: What's the relevance of that question?

18 MR. SCHADLER: Your Honor, there is going to be some  
19 contradictory testimony to this issue that we will see in the  
20 future.

21 JUDGE CARISSIMI: A question of how this witness paints  
22 herself is meaningless to me.

23 MR. SCHADLER: Okay.

24 JUDGE CARISSIMI: Don't answer the question.

25 BY MR. SCHADLER:



1 Q Now what then specifically -- you had two kids at the  
2 time, correct?

3 A Yes.

4 Q So what was your purpose for not reaching out to anyone to  
5 confirm what had just happened?

6 A Because I didn't feel that it was going to help me in any  
7 way and it was only going to harm them so I really didn't see  
8 the purpose of making a work situation harder for them.

9 Q Let me back that up then. How about beforehand when this  
10 pervasive environment was going on did you email other workers  
11 your concerns?

12 A We did not email. We texted.

13 Q Did you text and say, hey, listen guys, we need to unite  
14 to get the shift schedule right?

15 A We had conversations on almost every time we worked about  
16 what to do about it.

17 Q But nothing in writing?

18 A Never, no.

19 Q Nothing in email?

20 A We didn't sit at desks. We were bartenders.

21 Q Understood. Afterwards, did you email? Did you shoot  
22 somebody an email?

23 A I wasn't in the habit of --

24 JUDGE CARISSIMI: Sir --

25 THE WITNESS: I wasn't in the habit --

1 JUDGE CARISSIMI: Hold it, hold it.

2 THE WITNESS: Okay, sure. I'm sorry.

3 JUDGE CARISSIMI: Wait. When I speak, everybody is  
4 silent, all right? Give the witness a chance to answer your  
5 question for the second time, sir. Do you understand, do you  
6 remember the question?

7 THE WITNESS: I do, I do. We didn't have a relationship  
8 where email was even our second most common form of  
9 communication. We did not email with each other.

10 BY MR. SCHADLER:

11 Q You said you texted with one another.

12 A Infrequently regarding shifts, what time are you in, like  
13 if had an issue. Sarah was sick once, I had to cover for her.  
14 It wasn't -- I didn't have much of a relationship with them  
15 outside of work. It was very much work related. We talked  
16 when we were at work. I did one favor for Kris one time. We  
17 didn't have much of a relationship outside of work.

18 Q So other than work this is the only time -- work was the  
19 only time you got together?

20 A We never ate together outside of work. We never  
21 socialized with each other outside of work.

22 Q So you were not, other than co-workers, you weren't  
23 friends with any of these individuals?

24 A We were friendly, I would consider them -- I had a party  
25 for Fourth of July and invited Sarah and Mike when I first

1 started. I mean I wasn't specifically not friendly with them,  
2 but I had two small kids. Kris had six, that's hard to get  
3 together. Mike didn't have kids. Sarah was young and  
4 unattached, didn't have a family. We had little to nothing to  
5 really relate to outside of work. So we weren't in the same  
6 social circles, life circumstances. We didn't have those kind  
7 of relationships.

8 Q So allow me then to focus my question a little more.  
9 Other than being co-workers, once you stepped outside the walls  
10 of Kelly's --

11 A Yes.

12 Q -- you weren't friendly with them outside of the walls of  
13 Kelly's?

14 A I would have been or I could have been, I worked. I don't  
15 have friends otherwise. My friends are from graduate school  
16 and they live in other countries. I don't really have very  
17 many friends. My life in this stage of my life consists of  
18 small children and if I work. So I don't really have much  
19 other than that. I'm a stay at home mom. I don't do anything  
20 socially.

21 Q Let me ask again, I'd like to get just this one question.  
22 Outside the walls of Kelly's, were you friends with them?

23 JUDGE CARISSIMI: The witness has answered that question.

24 MR. SCHADLER: Maybe I missed -- I don't mean --

25 JUDGE CARISSIMI: Sir, it's been answered.

1 BY MR. SCHADLER:

2 Q Specifically involving your meetings with Ryan, I'd like  
3 to address those specifically.

4 A Okay.

5 Q You said to Ryan that you were concerned about the new  
6 hires taking your shifts, correct?

7 A I think it was we were concerned about new hires taking  
8 our shifts, but yes.

9 Q Who did you speak with about their shifts?

10 A Sarah, and Kris, and I talked about that.

11 Q Sarah?

12 A I'm so sorry, so Sarah, Kris Flood, Chris Healy had some  
13 conversations in there also.

14 Q How was it decided that you would be the one to, I'll use  
15 this phrase, carry the banner?

16 A It was more of an opportunity. I had the opportunity to  
17 talk to Ryan when he was there and not busy on the floor, so I  
18 would talk to him a lot of the time when I had a 5 o'clock  
19 shift and had an opportunity to talk to him. It wasn't a very  
20 busy time of the day.

21 Q What shifts did they want? Chris Healy?

22 A Chris Healy wanted more shifts. At that point, he was a  
23 server and bartender, and he wanted to move from what I heard  
24 him say, wanted move more to just being on the bar staff and  
25 wanted to make sure that as these schedules were opening up and



1 they were filling them with new hires that he would get them  
2 instead of someone new.

3 Q You said Ms. Flood?

4 A Yes.

5 Q What shifts did she want?

6 A Oh, she wanted the 5 o'clock shift also.

7 Q She wanted the same shift you wanted?

8 A Yes.

9 Q On at 5 o'clock.

10 A Always one, sometimes two.

11 Q And the other individual, I apologize, who else did you  
12 mention?

13 A Sarah Clark.

14 Q Sarah Clark, what shift did she want?

15 A She didn't want to lose shifts as these new hires came on  
16 in the last bit that she was there up until graduation.

17 Q What shifts did she want?

18 A She wanted to keep her shifts. So she didn't want to be  
19 bumped to a 9 o'clock start time. She didn't want to be bumped  
20 off of a Thursday, Friday, or Saturday because she was no longer  
21 going to be there she wanted to make sure that those shifts  
22 were going to stay consistent.

23 Q What start time did she want?

24 A I guess it depended on the day. I don't know the specific  
25 start time she wanted. She wanted to keep her shifts. Sarah

1 had been there longer than Kris and I.

2 Q Understood. Did Sarah work Thursday night?

3 A Yes.

4 Q Friday night?

5 A At 9 o'clock. She came in at 9 o'clock on Thursday always  
6 she had class.

7 Q You had said that she had a 7 o'clock start time? I just  
8 want to make sure I have that in my mind right.

9 A No, I didn't think I said 7 o'clock.

10 Q Okay, my apologies. So what time did she have?

11 A 9 o'clock on Thursday, but she no longer had class so she  
12 wanted an earlier start time. She always worked at 9 o'clock.  
13 She was hoping that now that there were more shifts available  
14 she could move up in start time because her classes had ended  
15 for the semester. She was graduating. She wanted an earlier  
16 start time for the rest of the time she was there. Does that  
17 make sense? Am I explaining that correctly?

18 Q Yes.

19 A Okay.

20 JUDGE CARISSIMI: All you can do is answer question. You  
21 don't have to ask any.

22 THE WITNESS: Okay. Sorry.

23 BY MR. SCHADLER:

24 Q What time did she want? You said she wanted to move up.

25 What time did she want to move up to?

1 A That was the extent of it. It was not a specific request  
2 for a start time.

3 Q There would be a 5:00 and 7:00 start time, correct?

4 A And a 9:00.

5 Q And a 9:00. But moving up would mean either 5:00 or 7:00?

6 A Correct.

7 Q And for you, you wanted a 5 o'clock start time?

8 A The days they were available, yes.

9 Q Thursday, Friday and Saturday.

10 A Thursday was usually a 7 o'clock start time.

11 Q Did you want a 5 o'clock start time on Thursday?

12 A To the best of my recollection, the shift -- the earliest  
13 shift started at 7 o'clock because that's when happy hour was  
14 over.

15 Q Would you have wanted a 5 o'clock start time on Thursday?

16 A If it was available, of course.

17 Q And Sarah wanted a 5 o'clock start time on Thursday.

18 A She wanted an earlier start time. She didn't say when.

19 Q Okay. That could have been 5 o'clock. And Sarah --  
20 sorry, Ms. Flynn --

21 A Flood?

22 Q Flood wanted a 5 o'clock start time?

23 A Yes.

24 Q And at most they would bring two bartenders on at that  
25 time.

1 A Correct.

2 MR. SCHADLER: May I have a moment, Your Honor.

3 JUDGE CARISSIMI: Yes. Off the record. You tell me when  
4 you're ready.

5 (Off the record.)

6 JUDGE CARISSIMI: You may continue.

7 MR. SCHADLER: Thank you.

8 BY MR. SCHADLER:

9 Q Your concern was that you were losing shift time and that  
10 you wanted to maintain that you were making the same amount of  
11 money. You were concerned about shift time and losing money,  
12 correct?

13 A I was concerned with shift start times and working more  
14 hours and making less money by picking up the extra shifts  
15 helping out and then not getting awarded the earlier start  
16 time.

17 Q When you say earlier start times, you're talking about  
18 Thursday, Friday, Saturday?

19 A Yes.

20 Q How is working on a Monday?

21 A Quite terrible.

22 Q How is working on a Tuesday?

23 A Also very slow.

24 Q How was working on a Sunday?

25 A Very slow.



1 Q And how was working on a Wednesday?

2 A Could be -- had potential to be better.

3 Q How was working on a Thursday?

4 A Generally was decent.

5 Q How was working on a Friday?

6 A Generally decent.

7 Q And how was working on a Saturday?

8 A Generally decent, also.

9 Q So Thursday, Friday, Saturday, at any time would be better  
10 than Monday, Tuesday, Wednesday, or Sunday?

11 A There were rare instances where you could do amazingly  
12 well for some odd reason on one of those other days, but  
13 overall, yes, those shifts were not desirable.

14 Q So save the odd reason Thursday, Friday, Saturday --

15 A Were consistently better, yes. We would generally make  
16 the same amount of money hourly.

17 Q And so these were, if I would use a word preferred  
18 positions, would that be --

19 A Correct.

20 Q -- an accurate term?

21 A Um-hum.

22 Q And people that -- people would want to work on the  
23 Thursdays, Fridays, and Saturdays for the preferred reasons  
24 you've stated.

25 A Yes.

1 MR. SCHADLER: Your Honor, if I may approach counsel?

2 JUDGE CARISSIMI: You may. Let's go off the record.

3 (Off the record.)

4 JUDGE CARISSIMI: Mr. Schadler, you have a document. Can  
5 you tell me what this document is? Can you describe it for me?

6 (Respondent's R-1 identified.)

7 MR. SCHADLER: Yes, I can, Your Honor. It's a shift  
8 schedule for Kelly's that was provided to the government as  
9 part of their subpoena. It starts on 4/28 of '14. However,  
10 there is a large break due to an issue we had trying to get it.  
11 It jumps all the way up to the more relevant period of 9/24/14.  
12 And then it goes all the way through to the end of April,  
13 beginning of -- end of April.

14 JUDGE CARISSIMI: Of 2015, correct?

15 MR. SCHADLER: Of 2015, that's correct, Your Honor.

16 JUDGE CARISSIMI: All right, thank you very much. We have  
17 -- I don't think the record is clear because we had a technical  
18 problem, but Mr. Faye you have no objection to the authenticity  
19 nor the relevancy of this document, although you may want to  
20 clarify it in some respect with regard to what the document  
21 shows, is that correct, sir?

22 MR. FAYE: Yes, Your Honor.

23 JUDGE CARISSIMI: And you are now moving this document  
24 into evidence, Mr. Schadler?

25 MR. SCHADLER: I will be, Your Honor, yes, I am.

1 JUDGE CARISSIMI: I'm going to admit Respondent's  
2 Exhibit 1 and you may proceed.

3 (Respondent's R-1 received.)

4 MR. SCHADLER: Thank you. I'm going to skip Page 1 if  
5 that's okay with everyone here because of the time difference,  
6 so I'll put that here. If I may use your --

7 JUDGE CARISSIMI: Absolutely, feel free.

8 BY MR. SCHADLER:

9 Q Ms. Helms, this is for the weeks dating 9/22 to 9/28. Can  
10 you please tell us what shifts you were scheduled on that --

11 JUDGE CARISSIMI: What page number is that document, sir?

12 MR. SCHADLER: Page 2.

13 JUDGE CARISSIMI: And how many pages are in the document?

14 MR. SCHADLER: 30.

15 JUDGE CARISSIMI: So there is 1 through 30.

16 MR. SCHADLER: That's correct, Your Honor.

17 JUDGE CARISSIMI: All right.

18 BY MR. SCHADLER:

19 Q For those dates, which days were you scheduled and what  
20 times?

21 A Thursday, Friday, and Saturday.

22 Q So those were the three preferred shift days, correct?

23 A Correct.

24 Q And what times were you scheduled?

25 A 7:00 for Thursday and Friday, and 5:00 for Saturday.

1 Q Those were all to close, correct?

2 A Correct.

3 MR. SCHADLER: Okay. Your Honor, if you'd like this?

4 JUDGE CARISSIMI: That's quite all right. If I need to,  
5 if I need to make rulings, but otherwise I will look at them  
6 obviously when I consider the case.

7 BY MR. SCHADLER:

8 Q Moving to the next week which is 9/29, what days were you  
9 scheduled again?

10 A Thursday, Friday, and Saturday.

11 Q And those would be the three preferred days?

12 A Yes.

13 Q What times were you scheduled on those days?

14 A 7:00, 9:00, and 5:00.

15 Q And all to close, correct?

16 A Correct.

17 Q And just so we're clear, you were reading them Thursday,  
18 Friday, and Saturday, 7:00 being Thursday, 9:00 being Friday,  
19 5:00 being Saturday, correct?

20 A Yes.

21 Q And those were all to close, correct?

22 A Yes.

23 Q Moving to the next week beginning 10/6 to 10/21 (sic),  
24 what days were you scheduled on those times?

25 A Thursday, Friday, and Saturday.



- 1 Q And Thursday what time were you scheduled?
- 2 A 7:00.
- 3 Q To close?
- 4 A Yes.
- 5 Q And Friday?
- 6 A 9:00 to close.
- 7 Q And Saturday?
- 8 A 5:00 to close.
- 9 Q And this week from 10/13 to 10/19, when were you
- 10 scheduled?
- 11 A Tuesday, 7:00 to close. Friday, 5:00 to close. And
- 12 Saturday, 7:00 to close.
- 13 Q So two of the three preferred days and one Tuesday,
- 14 correct?
- 15 A Yes.
- 16 Q The next week being 10/20 to 10/26, what days were you
- 17 scheduled on that week?
- 18 A Thursday, Friday, and Saturday.
- 19 Q Those are the three preferred days?
- 20 A Yes.
- 21 Q What time were you scheduled on Thursday?
- 22 A 7:00 to close.
- 23 Q And what time were you scheduled on Friday?
- 24 A 9:00 to close.
- 25 Q And what time were you scheduled on Saturday?

1 A 3:00 to close.

2 JUDGE CARISSIMI: Counsel, this document, Ms. Helms, is it  
3 clear on the document what her time schedule is?

4 THE WITNESS: It's clear what it's written as. That  
5 doesn't mean that's what actually ended up being the schedule,  
6 which often changed.

7 JUDGE CARISSIMI: Now the questions go to what's on the  
8 schedule, is that correct?

9 MR. SCHADLER: Yes.

10 THE WITNESS: Yes.

11 JUDGE CARISSIMI: So Ms. Helms is referred to as Robin in  
12 this document. Now there is a yellow line. On the rest of the  
13 copies there probably won't be.

14 MR. SCHADLER: That's correct, Your Honor.

15 JUDGE CARISSIMI: But when I see Robin, that's Ms. Helms,  
16 correct?

17 MR. SCHADLER: That is correct, that's Ms. Helms.

18 JUDGE CARISSIMI: All right. Now let me ask you since I  
19 have in evidence, why do we need questions to verify what those  
20 times are? Can't I look at those? Can't you make an argument  
21 in your brief to me on whatever you think this means?

22 MR. SCHADLER: We can, Your Honor, but it goes -- if I may  
23 make an offer of proof. If you're going to go through all of  
24 these and you can stop me if you feel that I'm testifying  
25 inappropriately, you're going to find that Ms. Helms is

1 scheduled on Thursday, Friday, and Saturday most throughout the  
2 entire shift schedule with the exception of a few weeks.  
3 You're going to find that on some weeks she was scheduled at  
4 5:00. Some weeks she was scheduled even earlier than that.  
5 But that it goes to -- pertaining to scheduling times.

6 JUDGE CARISSIMI: You can make that argument. But it  
7 seems to me you have the predicate to make it. The document is  
8 admitted.

9 BY MR. SCHADLER:

10 Q With the shift scheduling, you had spoken to Ryan,  
11 correct? Had you ever spoken to Gene?

12 A No.

13 Q Had you ever spoken to Angie?

14 A No.

15 Q Had you ever emailed Gene?

16 A No.

17 Q Had you ever emailed Angie?

18 A No.

19 Q Had you ever texted Gene?

20 A Not to my recollection.

21 Q Had you ever texted Angie?

22 A No, regarding the shift schedule.

23 Q Regarding your concerns with shift scheduling or the  
24 shifts that you were given.

25 A Yes.

1 Q To be clear, so I'm clear, I'd like to talk to you about  
2 the meeting you had where you said you were terminated.

3 A Okay.

4 Q What date was that?

5 A April 30, 2015.

6 Q And the testimony you provided, did that, and I may have  
7 asked this and I apologize if I did, encompass the entire  
8 meeting, to the best of your recollection?

9 A Yes, to the best of my recollection.

10 Q Prior to that meeting, do you recall an incident with  
11 Chelsea Heyward?

12 A I worked with her. Yes, there were incidents with her.

13 Q Ms. Heyward, I'll refer to her as Ms. Heyward, what is her  
14 race?

15 A African American I would guess. I don't know. I didn't  
16 talk to her about her background.

17 Q Did you observe her?

18 A Yes.

19 Q What would you say the complexion of her skin was?

20 A Like coffee with creamer. She was darker.

21 Q Do you recall an incident with Ms. Heyward where you  
22 refused to serve an African American patron?

23 A I've never refused to serve anyone.

24 Q So that incident never took place?

25 A I'm not saying that it -- that incident because I don't



1 believe that I ever refused to serve anyone that wasn't  
2 intoxicated.

3 Q Did you ever make comment to Ms. Heyward about not serving  
4 African Americans?

5 A Specifically not serving African Americans, no, I never  
6 made that comment to her.

7 Q When you were brought down in the meeting was it discussed  
8 with you that the reason you were brought down to that meeting  
9 was because of your refusal to serve an African American  
10 patron?

11 A Not specifically that I recall, no.

12 Q That was never brought up to you?

13 A I don't recall that at all.

14 Q As you sit here today you have no recollection of that  
15 conversation?

16 A That aspect of the conversation I don't, no.

17 Q Do you recall saying to Ms. Heyward that, I quote, "These  
18 black girls come in all the time and don't tip."

19 A There were possibly a handful of black girls that came in  
20 and they didn't come in together, so I wouldn't imagine I would  
21 ever reference something that way.

22 Q Do you recall making that statement?

23 A No.

24 Q Do you recall saying that you refuse to serve them, in  
25 reference to when I say them referring to African American

1 women?

2 A No. What I do --

3 Q Okay.

4 A Okay. I don't --

5 Q Were you finished with the answer?

6 A No, I wasn't.

7 Q Okay, please.

8 A Another patron, the sorority girl that I referred to  
9 earlier which was someone that was originally shown to me by  
10 Mike that was someone that came in that did not tip and  
11 habitually didn't tip, and he didn't like to serve her. She  
12 was someone we served last. And I remember that conversation  
13 with Chelsea. I didn't refuse to serve her. Chelsea and I  
14 were working together. Chelsea went and served her. I did not  
15 refuse to serve African Americans as a blanket statement. I  
16 never refused to serve her, either. Chelsea was also  
17 co-bartending that night and she served her.

18 Q So if Chelsea made that statement, she would be incorrect?

19 A Just I've never referred to a blanket group of people.  
20 That same night all of our bouncers and their girlfriend were  
21 there also. They all happen to be African American men with  
22 African American girlfriends and wives, so I was actually  
23 serving them as this girl came up to the bar.

24 Q Now during that meeting it was raised that you did not  
25 serve an African American, is that correct?

1 A I don't remember that part of the meeting at all.

2 Q And during that meeting do you recall Gene said to you  
3 that that could not happen, we could not have individuals  
4 refusing to serve African American women or African American  
5 clients.

6 A My extent of the recollection of that was Gene came in  
7 told me he heard what I said and then he left. At that point,  
8 the rest of the discussion happened between myself and Angie  
9 with very, very few inputs from Ryan. So Gene's comments were  
10 limited to what I testified they were.

11 Q Would it surprise you to learn that Kelly's does not have  
12 video surveillance? And what I mean by video surveillance,  
13 allow me to define that -- I mean audio surveillance, allow me  
14 to define that, surveillance designed to pick up words people  
15 are saying.

16 A It would surprise me that they don't, considering that's  
17 what Angie told me that they did.

18 Q The reason they wouldn't have that is because it's illegal  
19 in Pennsylvania.

20 A I was surprised when she told me they did in the first  
21 place. So I was initially surprised to hear that they were  
22 listening to my complaints and I was equally surprised now to  
23 hear that that was not the truth. I don't know. I don't know  
24 what to believe. I was told, but now I'm very confused.

25 Q The reason --

1 MR. FAYE: Your Honor, my objection is to the question,  
2 part of a fragment of the question of the reason is because it  
3 violates Pennsylvania law. It didn't sound like a question. I  
4 don't know if it was a statement. No foundation that there is  
5 a Pennsylvania law dealing with it. Just was an inappropriate  
6 comment.

7 JUDGE CARISSIMI: Well, the question was asked, the  
8 witness answered. Your comment has been made. We'll see what  
9 counsel, if he has another question.

10 BY MR. SCHADLER:

11 Q In fact, the reason -- would it surprise you that the  
12 reason that that statement was made by Angie was because  
13 Chelsea was concerned about retaliation due to what she  
14 perceived as racism.

15 MR. FAYE: I object. That's not a question. It sounds  
16 like a statement.

17 JUDGE CARISSIMI: That's a very long question, sir. I had  
18 trouble following it. Could you break that down?

19 BY MR. SCHADLER:

20 Q You were told that there was audio surveillance. When I  
21 say audio surveillance, just so I'm clear, I mean surveillance  
22 being picked up or words being picked up at the bar, correct?

23 A I'm sorry. Yes.

24 Q All right. And you had said there was none -- to none of  
25 your -- you've no recollection, you have no recollection, said



1 that inartfully, you have no recollection of any conversation  
2 regarding from Gene or Angie that night about your refusal to  
3 serve African American patrons?

4 A No.

5 Q And that you had said that they had stated to you they had  
6 picked it up on, quote/unquote, audio surveillance.

7 A That they picked up my complaints on audio and that was  
8 the reason for my termination.

9 Q They did not mention that the reason for your termination  
10 was because of failure to serve an African American patron?

11 A No.

12 Q You were a bartender there for approximate a year,  
13 correct?

14 A Yes.

15 Q Or more?

16 A Yes.

17 Q What percentage would you say of your clientele is African  
18 American?

19 A Very small.

20 Q How many would you say, ballpark?

21 A Of like the kids that came in?

22 Q Everybody.

23 A I don't know, one percent, two percent.

24 Q You said you have workers, individuals that work there  
25 that are African American, correct?

1 A Yes, yes.

2 Q Would it have been detrimental to the business or to the  
3 bar if Kelly's was known not to serve African Americans?

4 JUDGE CARISSIMI: You're asking her --

5 MR. FAYE: I object. How can she answer the question?

6 JUDGE CARISSIMI: Sustained.

7 BY MR. SCHADLER:

8 Q Now, Chelsea, you were tasked to train her, correct?

9 A Yes, I was. I was part of the -- yeah, I helped train  
10 her.

11 Q And during the time that you trained her, did you speak  
12 with her about the bar?

13 A Yes.

14 Q Did you speak with her about Kelly's?

15 A Yes. We were at Kelly's.

16 Q Did you speak to her -- I'm sorry?

17 A We were at work. That's what we talked about.

18 Q Did you recall telling her that one of the first things  
19 you said to her was you better not get shifts from me?

20 A Not at all, no.

21 Q Do you recall telling her that this place sucks?

22 A I actually never use that word.

23 Q Do you recall saying that she, referring to Chelsea, is  
24 not going to make any money here?

25 A No.

1 Q Do you recall saying that Chelsea should rethink and get  
2 another job?

3 A She specifically asked me about the shifts because Sarah  
4 had made comments to her, so that could have been something I  
5 said in response to her. I don't remember specifically those  
6 words. She asked if it could sustain her and her son, and I  
7 couldn't guarantee her that. My experience was it wasn't very  
8 consistent.

9 Q Now in the meeting you had, certainly you were accused of  
10 racism. That's a very heavy accusation. Would you consider  
11 that a heavy accusation?

12 A I absolutely never heard the word racist, not ever.

13 Q My question was if you were accused of being racist --

14 A I would think I would remember that, yes.

15 Q You would remember that. It is a very heavy accusation.

16 A I agree.

17 MR. SCHADLER: One moment, Your Honor.

18 JUDGE CARISSIMI: Certainly.

19 MR. SCHADLER: Thank you.

20 (Pause.)

21 BY MR. SCHADLER:

22 Q Now the meetings that you had with Ryan, how many meetings  
23 did you have?

24 MR. FAYE: Your Honor, I'm going to object because it's  
25 such an open-ended question. She worked for Ryan Henry.

1 JUDGE CARISSIMI: I'm going to sustain that objection. If  
2 you give a little more clarity to the question, perhaps the  
3 witness could answer it. You may rephrase.

4 BY MR. SCHADLER:

5 Q How many meetings did you have pertaining to shift  
6 scheduling with Ryan?

7 A Several. They weren't formal meetings. They happened  
8 when it was slow and the opportunity arose. There was --  
9 between just myself and Ryan or between myself, Ryan, and  
10 someone else?

11 Q Either one. If I may, can you do one at a time, how many  
12 would you say with, how many would you say you had with other  
13 people?

14 A Three or four by myself. In this last month period, in  
15 this last -- when this became an issue, it was in the last week  
16 of March throughout April, so we're talking about this period  
17 of time, I probably spoke to him four times, and then with Kris  
18 Flood and with Chris Healy, so about six all together roughly.

19 Q Okay, I apologize, the air conditioner kicked on again,  
20 four by yourself and then two with Ms. Flood and Mr. Healy?

21 A Well, one each.

22 Q One each, so one with Ms. Flood and one Mr. Healy. And  
23 all of these conversations were you, according to you,  
24 advancing the cause of all the bartenders?

25 A I would think I recall that I spoke about the cause of all



1 the bartenders, yes.

2 Q And during those meetings, even the one-on-one meetings  
3 you advanced the cause, you always spoke in terms of all the  
4 bartenders?

5 A I brought up that this was not my concern alone, yes.

6 Q And you had said that the other bartenders -- did you  
7 state the other bartenders are unhappy as well?

8 A That they are nervous. That they are unsure of their  
9 positions. That it's causing anxiety.

10 Q Now you had this with Ryan. Mike you said was the head  
11 bartender, correct?

12 A This was all happening as Mike was leaving.

13 JUDGE CARISSIMI: The question is, is Mike the head  
14 bartender?

15 THE WITNESS: Yes, he was the head bartender.

16 BY MR. SCHADLER:

17 Q Did you ever have conversations with Mike prior to his  
18 leaving about this?

19 A Possibly, when I referenced those other times when there  
20 was issues with losing a Thursday to Scott or losing a Thursday  
21 to Joe Fairley or Mike Selino.

22 Q So that would have been -- just so I'm clear, those were  
23 those dates you had given us before?

24 A Yes.

25 Q And you had spoken to Mike because he's the head

1 bartender?

2 A Well, he's also a co-worker.

3 Q Co-worker.

4 A Just as a co-worker. He didn't have much authority as far  
5 as my schedule so it wouldn't have -- he had a set schedule.  
6 He had no issues.

7 Q And you had couched it with Mike that we, the bartenders,  
8 or some derivative of that, are concerned about these issues?

9 A Yes.

10 Q How many conversations?

11 A I really don't think I can put -- I worked with him  
12 almost, I mean pretty much a year. I would say we worked  
13 together 11 1/2, 12 months, 3, 4 days a week. We had  
14 conversations. I really don't know that I can put a number on  
15 that accurately.

16 Q Could you estimate just a range of conversations,  
17 specifically like conversations about we, the bartenders, are  
18 upset about scheduling?

19 A I mean I'm recalling right now an instance where Kris  
20 Flood and I were talking to him behind the downstairs bar and I  
21 mean that was one. I don't know. I can't recall. It's hard  
22 to say.

23 JUDGE CARISSIMI: Well, there's one. Do you recall if  
24 there is more than one?

25 THE WITNESS: Oh, definitely more than one. Five. Five,

1 six.

2 BY MR. SCHADLER:

3 Q Five or six?

4 A Sure, that sounds --

5 Q And no one is going to hold you to an exact number, but a  
6 ballpark would be about five or six?

7 A Maybe five throughout the year, yes.

8 Q Now you said that Mike was leaving, correct?

9 A Yes.

10 Q And I apologize, I didn't mean to put it that way.

11 JUDGE CARISSIMI: That's all right.

12 BY MR. SCHADLER:

13 Q Mike was leaving.

14 A Correct. He gave his two weeks' notice.

15 Q Who else was leaving -- I'm sorry?

16 A He had given his two weeks' notice.

17 Q Who else was leaving?

18 A Sarah Clark was leaving.

19 Q So those were two spots that were opening up.

20 A Yes.

21 Q And prior to their leaving, when was their leaving?

22 A I think roughly Mike left the last week of March and Sarah  
23 was leaving the second week of May.

24 Q So you were going to be down two bartenders.

25 A Yes.

1 Q And prior to this, were there concerns about your shift  
2 scheduling prior to Mike leaving?

3 A Rarely.

4 Q So the real issues were March, April time frame.

5 A There were a lot of issues at that time, yes.

6 Q At that time you were actually down a bartender, correct?

7 A Ryan had filled in sometimes, yes, so there were some  
8 holes in the schedule.

9 Q So you were picking up more shifts at that time?

10 A Absolutely.

11 Q And you were seeing -- you were getting more choice  
12 shifts?

13 A Well, no. I think that my schedule pretty much stayed the  
14 same except that I picked up Tuesday night, and Wednesday  
15 night, and Sunday, which I testified were not good shifts.

16 MR. FAYE: Your Honor, just a point of information. I  
17 think the record should be made clear that the Mike is the head  
18 bartender to all the comments that we just heard as to Mike  
19 Bevevino and not to another bartender that's been referred to  
20 in the record, Mike Selino, S-E-L-I-N-O.

21 BY MR. SCHADLER:

22 Q Were you still getting choice shifts at that time, the  
23 preferred shifts during April, the month of April?

24 A I was still working Thursday, Friday, and Saturday.

25 Q In fact, I'm going to show you what's been marked as



1 Exhibit 1 for the Respondent and that's Page 29, if I may  
2 specifically reference that. On this schedule, please read the  
3 date that you were working on that schedule and times.

4 A Tuesday, 7:00 to close, training Chelsea. 7:00 to close  
5 on Thursday. 5:00 to close on Friday. Open to close on  
6 Saturday.

7 Q What time was open?

8 A I would arrive at 10:00 a.m. Now this says 11:00, so I  
9 mean --

10 Q You're scheduled from 11:00 till close. And when will  
11 close be?

12 A This would say 2:00, but we close at 3:00 a.m.

13 Q 3:00 a.m. So that week you actually worked significantly  
14 more shifts and that was the week of the 13th.

15 A More than even is indicated here.

16 Q So you actually picked up more shifts than that?

17 A I worked longer hours. I think the 38 doesn't include the  
18 hour for closing and cleanup. I think these hours don't  
19 indicate what time I actually arrived for work because it says  
20 11:00 a.m., but I actually got there at 10:00. When it says  
21 closing, I think this number probably includes 2:00 a.m. All  
22 of the closings are at least 3:00 a.m. by the time we clocked  
23 out and left.

24 Q Okay. But you were scheduled for more shifts?

25 A Yeah.

1 Q And in fact you were saying that you even picked up more  
2 time that's allotted here.

3 A Yeah, we definitely need to hire people, yeah.

4 Q And on the next week, that would be Page 30, when were you  
5 scheduled there?

6 A Tuesday night from 10:00 p.m. to close.

7 Q That was not a preferred shift.

8 A Clearly. Wednesday --

9 Q You say clearly. Does that mean yes?

10 A I'm sorry, yes. Yes, not a preferred shift at all.  
11 Wednesday from 7:00 to close.

12 Q Not a preferred shift or that was --

13 A It was getting better because it was end of the year, so  
14 it was likely that we would do a little more business.

15 Q So was that better than Monday, Tuesday and Sunday, a  
16 Wednesday shift at that time?

17 A This time of year, yes.

18 Q Thursday?

19 A 7:00 to close.

20 Q Friday?

21 A 5:00 to close.

22 Q And Saturday?

23 A 7:00 to close.

24 Q Did you work any time Sunday?

25 A This doesn't say that I did, but I worked that party

1 upstairs that day.

2 Q So you picked up a party. Were parties generally good  
3 money makers?

4 A Not at all and specifically not this party.

5 Q Okay. But on these dates, which was the week prior to  
6 your separating from the company --

7 A Yes.

8 Q -- you worked the preferred shifts and in fact picked up  
9 more shifts on top of that.

10 A Right. I was asked to help.

11 Q You said you did need to hire people.

12 A Absolutely.

13 MR. SCHADLER: Can I have one moment, Your Honor?

14 JUDGE CARISSIMI: You may. Let's go off the record and  
15 tell me when you're ready.

16 (Off the record.)

17 JUDGE CARISSIMI: You may proceed.

18 MR. SCHADLER: Thank you.

19 BY MR. SCHADLER:

20 Q Ryan, was he at the meeting, the full meeting where you  
21 were terminated? Was he there from start to --

22 A My recollection is yes.

23 JUDGE CARISSIMI: And that's Ryan Henry?

24 MR. SCHADLER: Ryan Henry. My apologies.

25 BY MR. SCHADLER:

1 Q Was Gene Mitchell there from start to finish?

2 A No.

3 Q When was he there for?

4 A He walked in, made a comment, and if he came back I don't  
5 know but he seemed to walk away at the end of that and that's  
6 when I turned to Angie. I never turned back to the door. It  
7 didn't seem anyone was looking past me to engage him. I don't  
8 think he was there.

9 Q And was Angie there the whole time?

10 A Yes.

11 Q Afterward, did you find a job after this?

12 A No.

13 Q You filed for --

14 MR. FAYE: Objection to relevance.

15 JUDGE CARISSIMI: Sustained.

16 MR. SCHADLER: Your Honor, I have nothing further at this  
17 time but I reserve the right to recall on, perhaps if after,  
18 our case in chief.

19 JUDGE CARISSIMI: Very good. Mr. Faye, do you have any  
20 redirect?

21 MR. FAYE: Brief.

22 JUDGE CARISSIMI: You may proceed.

23 REDIRECT EXAMINATION

24 BY MR. FAYE:

25 Q Ms. Helms, you referred to a sorority girl?



1 A Yes.

2 Q What was the race of that sorority girl?

3 A She was African American.

4 Q What if anything at all was said at the discharge meeting  
5 on April 30, 2015, by Mr. or Ms. Mitchell or Mr. Henry about  
6 race?

7 A I don't recall anything being brought up about race.

8 Q What if anything at all was said at the discharge meeting  
9 by Mr. and Ms. Mitchell or Mr. Henry regarding African American  
10 persons or people?

11 A I don't recall anything.

12 Q What if anything at all was said at that discharge meeting  
13 by Mr. and Ms. Mitchell or Mr. Henry about you or anyone else  
14 being a racist?

15 A I really don't recall anything.

16 COURT REPORTER: You have to speak up.

17 THE WITNESS: I don't recall anything. Sorry.

18 BY MR. FAYE:

19 Q During your employment, what if any time did Mr. or Ms.  
20 Mitchell or Mr. Henry ever accuse you of not serving or serving  
21 late an African American person?

22 A Never.

23 Q When if ever during your employment did Mr. and Ms.  
24 Mitchell or Mr. Henry ever accuse you of being a racist?

25 A Never.

1 Q As far as you can recall at the discharge meeting on  
2 April 30, 2015, what if any comments were made whatsoever by  
3 Mr. or Ms. Mitchell or Mr. Henry about the topic of race?

4 A Nothing.

5 Q How would you describe your relationship during the  
6 several weeks you worked with Chelsea Heyman -- Heyward, how  
7 would you describe your relationship with her during those few  
8 weeks that you worked with her?

9 A Friendly and professional.

10 Q And indeed how if at all did you assist Ms. Heyward as to  
11 tipping for a trainee?

12 A Knowing that she was a single mom, we had that  
13 conversation. It's not customary to tip someone when they're  
14 training in a restaurant. I gave her a tip at the end anyway  
15 because I knew she was -- it's rough to go home without making  
16 any money. So her first -- the night I trained her, that first  
17 night I gave her money when I -- it is absolutely we're not  
18 supposed to. Even it's kind of a bar rule that she was getting  
19 more pay from -- what typically happens is you train at a bar,  
20 you make \$2.83 an hour which you're a full-time employee, but  
21 while you're training you make a little bit more and at Kelly's  
22 they would give you a shift meal was included in that. So I  
23 knew she wasn't making anything so I gave her \$20.

24 Q Are you referring to the -- what day of training was this  
25 for Ms. Heyward?

1 A It was a slow night. I think it was Tuesday night, so I  
2 gave her half of the money I made. I didn't really walk away  
3 with anything after that.

4 Q How much training had she had before that day?

5 A My understanding is she worked with Sarah before that. I  
6 don't know what day of the week it was.

7 Q Do you know whether or not Sarah Clark gave any tip to  
8 trainee Chelsea Heyward?

9 A From what Sarah told me, she did not tip her. I didn't  
10 ask Chelsea.

11 Q Yes. Counsel showed you Respondent 1, a group of  
12 schedules. Do you have that in front of you?

13 A I do not.

14 Q That's fine. Are those schedules set in stone?

15 A No, they are not.

16 Q Are there shifts that you worked that would not be  
17 reflected on those schedules?

18 A Yes.

19 Q As far as you know, are there shifts that you were  
20 scheduled for on those schedules that you may or may not have  
21 worked?

22 A Yes.

23 Q Can you explain why the schedules that are represented in  
24 Respondent 1 are or are not reliable as to determining how many  
25 hours a week you worked or what shifts you worked?

1 A Often there was -- I think even in one of the last weeks  
2 there was a party I wound up working because from what I recall  
3 Chris Healy said he needed off that day. Ryan scheduled him  
4 anyway. Ryan was stuck for someone to work so I picked it up  
5 for him as a favor. Things like that often happened where  
6 necessarily the request off wasn't remembered or a party  
7 scheduled that wasn't planned originally. There were a large  
8 variety of reasons.

9 Q Are parties normally put on the schedule, if you know?

10 A I wasn't involved in parties very often. I didn't get  
11 very many parties. That party that I wound up picking up was  
12 not a good party. But I didn't work very many parties.

13 JUDGE CARISSIMI: But the question was --

14 THE WITNESS: I'm sorry, did I answer it wrong?

15 JUDGE CARISSIMI: -- did parties appear on the schedule?

16 THE WITNESS: I think so. It's not something that I  
17 looked at a lot because I wasn't on them, so I think that they  
18 mostly were on the schedule.

19 JUDGE CARISSIMI: All right, thank you.

20 THE WITNESS: Did I answer it clearly enough for you?

21 MR. FAYE: Yes, that's --

22 THE WITNESS: I'm sorry.

23 JUDGE CARISSIMI: I'm sure you answered as best you can,  
24 that's all.

25 THE WITNESS: The best I could, yeah, I don't know if I



1 could be more clear, though.

2 BY MR. FAYE:

3 Q Please don't ask questions.

4 A Sorry.

5 Q We have enough lawyers here. The lawyers give the  
6 questions. Thank you.

7 If you know were the -- are the schedules, in light of  
8 comments regarding Sarah Clark, what if any changes were made  
9 in the schedules that are assigned as to Sarah Clark because of  
10 her college courses or defending a thesis, or other reasons?

11 MR. SCHADLER: Objection, Your Honor. It's compound and  
12 I'm not even sure that I follow it.

13 JUDGE CARISSIMI: Sustained. It's a very long question,  
14 counsel. It is compound.

15 BY MR. FAYE:

16 Q Do you know or not know the accuracy of the schedules that  
17 you were shown as to Sarah Clark because of her college  
18 activities?

19 MR. SCHADLER: Objection, Your Honor. Again, it's  
20 extremely --

21 JUDGE CARISSIMI: Yeah, I'm going to sustain the objection  
22 again. Is this something that's particularly relevant, Mr.  
23 Faye, this point? If it is, I mean I'll give you another run  
24 at it, but --

25 MR. FAYE: Well, I think it goes to reliability of the

1 document. I don't have a problem with the admissibility of it.  
2 I did state on there I had no objection, which I didn't state  
3 on the record. I know you admitted it into evidence. I don't  
4 have an objection to it. I think the question is the  
5 reliability of Respondent 1.

6 BY MR. FAYE:

7 Q Do you know whether or not the schedules accurately  
8 reflect the shifts worked by Sarah Clark?

9 MR. SCHADLER: Objection, Your Honor.

10 JUDGE CARISSIMI: That I'm going to overrule. That's a  
11 pretty straightforward question.

12 THE WITNESS: I'm confused. I'm sorry. I don't  
13 understand that.

14 BY MR. FAYE:

15 Q Do you know whether or not --

16 A Yes.

17 Q -- the schedules in Respondent 1 reflect accurately the  
18 shifts worked? Do you know?

19 A I didn't have much of an opportunity to look at it other  
20 than a couple of pages that he handed me and I only like he  
21 said looked at the highlighted area, so I can't say that I  
22 spent any time looking at it other than the highlighted part  
23 with my name on it.

24 Q Were you involved in any switches of shifts with other  
25 bartenders after the issuance of the schedule for an upcoming

1 week?

2 A Yes, that happened.

3 Q Can you recall where after the schedule was issued you  
4 switched with another bartender as scheduled? A shift, I'm  
5 sorry, a shift.

6 A Yes. Yes, yes.

7 Q Can you recall an incident?

8 A There was an incident I was scheduled for a Saturday. I  
9 had something come up. I think -- I can't recall what it was,  
10 but Sarah picked it up for me and did the double. So I was  
11 supposed to work a double open to close, so Sarah took that and  
12 I came in at her start time. There was another incident where  
13 Sarah was very sick for a bunch of days. I picked up -- I  
14 think I picked up two things for her because she just  
15 unavailable and she was scheduled, and you're supposed to get  
16 your own shifts covered if it's already scheduled so I worked  
17 those for her. One was a Sunday.

18 Q Would this have been after the schedule was issued?

19 A Yes. The schedule would have already been posted. Sarah  
20 got sick. I took her Sunday for her. Something came up with  
21 me. Sarah worked my open and then did the close. We literally  
22 switched everything. So I was 11:00 to 7:00 open and then 7:00  
23 to close. Sarah wasn't scheduled in until 9 o'clock that  
24 night, so I lost everything and we literally switched  
25 everything so I came in at 9 o'clock that night.

1 Q After schedules were issued during the roughly year that  
2 you worked for the Employer --

3 A Yes.

4 Q -- were there times or not when you worked a shift where  
5 the bartender scheduled -- bartender or bartenders scheduled  
6 with you were switched?

7 A Switched on me not by a request?

8 Q Yes.

9 A Yes.

10 MR. FAYE: No further questions.

11 JUDGE CARISSIMI: Is there any recross?

12 MR. SCHADLER: Just briefly, Your Honor, just briefly.

13 Thank you.

14 RECROSS EXAMINATION

15 BY MR. SCHADLER:

16 Q Your concern was that the schedule would come out on a  
17 Saturday you said and you'd be concerned about your upcoming  
18 shift, correct?

19 A Yes.

20 Q Now the shift that came out was the shift that we saw,  
21 that document. This is the shift that was sent out via that  
22 email?

23 JUDGE CARISSIMI: You're referring to Respondent's  
24 Exhibit 1, sir?

25 MR. SCHADLER: Yeah, I apologize.



1 BY MR. SCHADLER:

2 Q Respondent's Exhibit 1, that's the shift that came out?

3 A Yes.

4 Q So you would actually receive -- the documents that we've  
5 admitted as Exhibit 1 are the ones that you received on that  
6 Saturday.

7 A Yes.

8 Q And those were what you were scheduled for.

9 A Correct.

10 Q Now you would, as you stated, make changes but those  
11 changes were between yourself and other bartenders, correct?

12 A Mostly.

13 Q Mostly?

14 A Yes.

15 Q Would you call up Angie to make a switch between you and  
16 Kris, as you had stated before?

17 A We had to get it approved by Ryan.

18 Q So you would work it out and then have it approved by  
19 Ryan?

20 A Yes.

21 Q So you or the other person would either reach out to you  
22 via text, phone, or at the bar?

23 A I think the thing with Sarah, Ryan said she's really sick,  
24 she's looking for someone to cover, and then I got a text from  
25 Sarah can you do this. So Ryan got to me first because he

1 already knew she was sick, but yes.

2 Q But that was a request. You weren't ordered to abandon a  
3 shift for somebody else, correct?

4 A That had happened, yes.

5 Q When did that happen?

6 A That happened on a Friday with Joe Fairley. I was  
7 scheduled to come in at 5 o'clock. Joe Fairley was scheduled  
8 open, then he was 11:00 to 5:00 open, and then I think the  
9 schedule said he was coming in at 7:00 or 9:00 that night. He  
10 didn't want that gap in his schedule. He called Angie and  
11 complained. I got bumped to the 9 o'clock. He took my  
12 5 o'clock. That's one specific time I can remember that  
13 happened.

14 Q What other specific times can you remember absent the time  
15 where there was a shift issue in the schedule with the gap?

16 A To do what?

17 Q That you were forced out of a shift you were scheduled  
18 for.

19 A I'm leaning to want to say something happened in the  
20 summer months when I was scheduled for something and Kristin  
21 realized that Joe or Mike, it was one of them, weren't  
22 scheduled for something so she had to take something away from  
23 me.

24 JUDGE CARISSIMI: That would be the summer of 2014?

25 THE WITNESS: Correct.

1 JUDGE CARISSIMI: Thank you.

2 THE WITNESS: Sorry.

3 BY MR. SCHADLER:

4 Q There's a lot of somethings there. Summer '24 --

5 A I can't remember -- I remember that specifically. I was  
6 very upset about that date. That as something I talked to  
7 Kristin about.

8 Q Which one?

9 A The loss of those hours. It was in December. I made very  
10 little money that month of December. I had finally a good  
11 shift and I lost it so I was very upset about that day which is  
12 why I remember it very specifically.

13 JUDGE CARISSIMI: When did the shift change occur?

14 THE WITNESS: I think that I received information of that  
15 on Thursday.

16 JUDGE CARISSIMI: What month?

17 THE WITNESS: It was in December.

18 JUDGE CARISSIMI: December, all right.

19 THE WITNESS: December of 2014.

20 JUDGE CARISSIMI: Thank you. Counsel?

21 BY MR. SCHADLER:

22 Q Just so I'm clear, that's the incident with?

23 A Joe Fairley.

24 Q Joe Fairley was in December. And you seem to recall an  
25 incident in the summer where there was a scheduling -- another

1 scheduling screw up?

2 A The summer following that, yes, so we're talking about the  
3 summer of -- wait, December 2014. They weren't there in  
4 December of 2015. Wait, hold on. I'm confused with the dates  
5 now.

6 Q Joe Fairley, when was that incident?

7 A It was in December.

8 JUDGE CARISSIMI: Of 2014?

9 THE WITNESS: While he was employed there, yes. He was  
10 not employed there for two Decembers.

11 JUDGE CARISSIMI: Before your discharge date?

12 THE WITNESS: Right, exactly, yes, April of 2015.

13 JUDGE CARISSIMI: Right.

14 BY MR. SCHADLER:

15 Q And the second one took place when?

16 A The summer of 2014.

17 Q Was that another scheduling issue as pertained to a gap  
18 with somebody so they weren't sitting around?

19 A No, it wasn't. It was that he wasn't on the schedule so  
20 she had to take me off after I was on the schedule and put him  
21 on there. And I can't remember if "him" was Joe or Mike  
22 Selino. It was one of them because in the summer months we had  
23 to rotate. She claimed that he hadn't been on for a while so  
24 she had to put him on and take me off.

25 Q The week pertaining to the Joe Fairley incident, you were



1 actually given an additional shift to compensate you for that,  
2 correct?

3 A I don't recall.

4 Q You don't recall that -- you don't recall a shift being  
5 given to you?

6 A No. I recall being very upset about that incident. I  
7 don't recall a shift being given to me.

8 Q You do not recall speaking with the manager that an  
9 additional shift was provided to you to make up for that  
10 situation?

11 A And additional shift? Which was it, because whether or  
12 not it makes up for it, it would --

13 Q Were you given a shift that you were not originally  
14 scheduled for after that shift was taken from you?

15 A That week?

16 Q At any time. Were you given a compensation shift, I'll  
17 call it.

18 A I don't recall.

19 Q You don't recall if you were ever given, and I don't mean  
20 specifically a Friday or Thursday. Were you given a shift you  
21 weren't scheduled for to say, hey, you were taken off this,  
22 we're going to give you an additional schedule?

23 A I don't recall them specifically saying to me that we took  
24 this and we're giving you, I don't recall that conversation.

25 Q Did you ever email Angie or Gene about any of those issues

1 at all, being take off the shift schedule at all?

2 A No.

3 Q Text them or talk to them?

4 A I was told not to.

5 Q And who told you not to?

6 A At that time, Kristin Lang told me I shouldn't.

7 Q And then subsequent to that was Ryan Henry.

8 A Correct.

9 MR. SCHADLER: No further questions, Your Honor.

10 JUDGE CARISSIMI: Very good. I take it you have no  
11 redirect, Mr. Faye?

12 MR. FAYE: No, thank you, no other questions.

13 JUDGE CARISSIMI: Ms. Helms, you're excused as a witness.  
14 You may step down.

15 THE WITNESS: Thank you.

16 JUDGE CARISSIMI: Let's go off the record.

17 (Off the record.)

18 JUDGE CARISSIMI: It is your intention to call your next  
19 witness?

20 MR. FAYE: Yes, Your Honor. I'm going to call as a 611(c)  
21 witness, Gene Mitchell.

22 JUDGE CARISSIMI: Mr. Mitchell, if you would please stand  
23 for a moment and raise your right hand?

24 (Whereupon,

25 EUGENE MITCHELL,

1 was called as a witness by and on behalf of the General Counsel  
2 and, after having been duly sworn, was examined and testified  
3 as follows:)

4 JUDGE CARISSIMI: Please have a seat. Mr. Faye, you may  
5 proceed.

6 MR. FAYE: Thank you.

7 DIRECT EXAMINATION

8 BY MR. FAYE:

9 Q Please state your name and address for the record.

10 A Eugene Mitchell, 632 Overhill Road, Ardmore, Pennsylvania,  
11 19003.

12 Q What is your position with Kelly's Taproom?

13 A I'm the majority owner and managing partner.

14 Q Are you married to Angelia Mitchell?

15 A Yes.

16 Q What does Mid-Atlantic Restaurant Group, LLC, consist of?

17 A It's the owner of Kelly's Taproom.

18 Q Any other entities?

19 A Mid-Atlantic Restaurant Group?

20 Q Yes.

21 A No.

22 Q Flip & Bailey's Bar and Grill, and Garrett Ale House, are  
23 they not under the Mid-Atlantic umbrella?

24 A They are not. They're all separate companies.

25 Q Thank you. Where are Flip and Bailey's, and Garrett,

1 G-A-R-R-E-T-T?

2 A Yes.

3 Q Ale House located?

4 A In Rosemont.

5 Q Pennsylvania?

6 A Yes.

7 Q How far is that from Kelly's?

8 A Maybe a mile.

9 Q Do you co-own all three?

10 A I do.

11 Q Is your wife a co-owner of all three?

12 A She is not.

13 Q Is she a co-owner of any of the three?

14 A I don't believe so.

15 Q Are you married to Angelia Mitchell?

16 A Yes.

17 Q Is it fair to say that during Robin Helms' employment that  
18 bartenders occasionally expressed concern about which shifts  
19 they were assigned?

20 A No.

21 (Pause.)

22 MR. FAYE: May I have one second, Your Honor?

23 JUDGE CARISSIMI: You may. Let's go off the record.

24 (Off the record.)

25 BY MR. FAYE:



1 Q Do you remember meeting with Board Agent Christy  
2 Bergstresser, B-E-R-G-S-T-R-E-S-S-E-R, on November 10, 2015?

3 A I do.

4 Q Do you recall telling her people will (indiscernible)  
5 concern about which shifts they are assigned?

6 A Not to me, but I do remember saying that to her.

7 Q So I will ask again is it correct that during Robin Helms'  
8 employment the bartenders occasionally expressed concern about  
9 which shifts they were assigned?

10 A That's correct.

11 Q Is it correct that Robin Helms always was asking for  
12 longer shifts?

13 A Robin did tell me she would like longer shifts, yes.

14 Q Is it correct that you let Ryan Henry know about that?

15 A That is correct.

16 Q Is it correct that Ryan Henry told you that Robin Helms  
17 was complaining about shifts to other employees?

18 A Say that again?

19 Q Is it correct that Ryan Henry told you that Robin Helms  
20 was complaining about shifts to other employees?

21 A Correct.

22 Q Also is it correct that Ryan Henry told you that Robin  
23 Helms complained about shifts to him, too?

24 A Correct.

25 Q I'd like to show you, Mr. Mitchell, what's been marked as

1 General Counsel Exhibit 3.

2 (General Counsel's GC-3 identified.)

3 BY MR. FAYE:

4 Q Can you please identify this document which is 21 pages  
5 long?

6 A This is the employee handbook that the employees sign when  
7 they start working at the restaurant.

8 JUDGE CARISSIMI: What restaurant is that, sir?

9 THE WITNESS: Well, we use the same template for all three  
10 restaurants, so it would depend on which restaurant they were  
11 hired.

12 JUDGE CARISSIMI: All right. But one of the three is  
13 Kelly's Taproom, correct?

14 THE WITNESS: Yes, sir.

15 JUDGE CARISSIMI: Very good, thank you.

16 BY MR. FAYE:

17 Q So this employee handbook is for Kelly's Taproom, Flip and  
18 Bailey's Bar and Grill, and Garrett Hill Ale House, is that  
19 correct?

20 A That's correct.

21 Q Is it correct that pursuant to the employee handbook --  
22 sir, is this the current employee handbook in effect?

23 A I believe it is, yes.

24 Q Is it correct that pursuant to the employee handbook, the  
25 Employer will discipline employees for criticizing, condemning,

1 or complaining in a manner that affects employee morale?

2 A Say it again?

3 Q Is it correct that pursuant to the employee handbook, the  
4 Employer will discipline employees for criticizing, condemning,  
5 or complaining in a manner that affects employee morale?

6 A I don't know. Is it somewhere in the handbook? I don't  
7 believe that.

8 Q I would call your attention, sir, to Page 18.

9 JUDGE CARISSIMI: Mr. Faye, is it your intention to move  
10 to introduce this document?

11 MR. FAYE: Yes. I was going to move the document now that  
12 he --

13 JUDGE CARISSIMI: Yes. My practice is once a document is  
14 authenticated, if you want to move it into evidence do it  
15 because I don't want a lot of questions about a document that  
16 sometimes doesn't get into evidence. So once it is  
17 authenticated, let's move it in. So are you moving it?

18 MR. FAYE: Yes. Now that he's said that as far as he  
19 knows it's the current employee handbook.

20 JUDGE CARISSIMI: I have one further question on that.  
21 Mr. Mitchell, was this the handbook in effect on April 30,  
22 2015?

23 THE WITNESS: I believe so, yes.

24 JUDGE CARISSIMI: Very good. Is there any objection to  
25 the introduction of General Counsel Exhibit 3?

1 MR. SCHADLER: No, Your Honor. Thank you.

2 JUDGE CARISSIMI: General Counsel 3 is admitted.

3 (General Counsel's GC-3 received.)

4 BY MR. FAYE:

5 Q As I recall, this has been in effect since 2009, am I  
6 correct about that?

7 A I believe so, yes.

8 Q I was just going to call your attention in asking you the  
9 question I did to Page 18, under disciplinary guidelines where  
10 it says --

11 JUDGE CARISSIMI: Well, sir, if it says something in the  
12 handbook, it's now admitted, that you think is relevant you can  
13 tell me what that is in the brief, can't you? Do I need the  
14 witness --

15 MR. FAYE: Certainly. But, Your Honor, the only reason  
16 we're talking about it is because I asked a question and the  
17 witness said, oh, is that in the employee handbook, can you  
18 tell me. So I was pointing it out. I was going to point it  
19 out to him.

20 JUDGE CARISSIMI: But it seems to me the document, as they  
21 say, it says what it says so why do I need questions from the  
22 witness on it?

23 MR. FAYE: Okay. That's what I'm calling your attention  
24 to, Page 18, Your Honor, and thank you now it's admitted into  
25 evidence, General Counsel Exhibit 3, thank you.



1 BY MR. FAYE:

2 Q Is it correct that Robin Helms and other employees'  
3 complaints to each other and management about shift schedules  
4 affected employee morale negatively?

5 A I do know she complained to management, specifically to  
6 Ryan Henry. I don't know if she complained to other employees  
7 to the point where it affected their morale. I do know that  
8 Robin did other complaining that affected employee morale. I  
9 don't necessarily know it was about shift schedules. Matter of  
10 fact, I don't think it was, but I'm not 100 percent certain.

11 (General Counsel's GC-4 identified.)

12 BY MR. FAYE:

13 Q I'd like to show you what's been marked as General Counsel  
14 Exhibit 4, which was received in response to subpoenaed  
15 documents. I know that it does encompass already in part  
16 General Counsel Exhibit 2.

17 MR. SCHADLER: If I may make a suggestion, Your Honor?  
18 This is actually an additional email on top of what is  
19 Exhibit 2. Could we perhaps, since Exhibit 4 is in itself  
20 contained in Exhibit 2, could we just make this to be Exhibit 2  
21 now?

22 JUDGE CARISSIMI: Well, it's already been marked. It's  
23 going to be administratively easier just to leave it.  
24 Normally, I'm not a fan of duplicate exhibits but that's the  
25 way the document is prepared. Counsel has pointed out that

1 there is duplication. But we're going to leave it as General  
2 Counsel 4. You may proceed, Mr. Faye.

3 BY MR. FAYE:

4 Q Can you identify this three-page document -- four-page  
5 document?

6 A It looks like it's a complaint that a patron had while at  
7 our restaurant, Kelly's Taproom, for poor service that was sent  
8 to -- we have an info email address, so it was sent to that,  
9 which myself and a number of other people get copies of the  
10 emails. I then sent that to the bartenders at Kelly's, not  
11 knowing who this person was. I don't -- if I remember  
12 correctly and from reading here, I sent the complaint to the  
13 people, the bartenders at Kelly's to let them know that this  
14 was not the way to treat people.

15 Q Is it correct that no bartender was disciplined as a  
16 result of this particular customer complaint?

17 A No. Sarah Clark stepped up. We didn't know who the  
18 bartender was. And Sarah Clark came and admitted that she was  
19 at fault. And I spoke to her about that and she apologized and  
20 said she was going to try to do better. So, no, there was no  
21 disciplinary action per se taken because the situation was  
22 addressed, she was made aware of it, and her behavior was  
23 corrected.

24 Q Thank you.

25 MR. FAYE: I move for its admission.

1 JUDGE CARISSIMI: Any objection to General Counsel  
2 Exhibit 4?

3 MR. SCHADLER: None at all, Your Honor.

4 JUDGE CARISSIMI: GC-4 is admitted.

5 (General Counsel's GC-4 received.)

6 BY MR. FAYE:

7 Q Is it correct that some bartenders will give better  
8 service to customers who tip better although this practice is  
9 frowned upon?

10 MR. SCHADLER: Objection, Your Honor, lack of foundation.

11 JUDGE CARISSIMI: Well, Mr. Kelly (sic) owns the bar and  
12 can tell us what he knows. Overruled.

13 THE WITNESS: That's quite common in the restaurant  
14 industry, yes.

15 JUDGE CARISSIMI: I'm sorry, Mr. Mitchell. I confused the  
16 name of your establishment. I apologize.

17 THE WITNESS: No problem.

18 BY MR. FAYE:

19 Q Isn't it correct that when bartenders indicate that they  
20 will not serve those who do not tip you have corrected them  
21 that it is not appropriate, but you have not taken disciplinary  
22 action?

23 A No, we have taken disciplinary action at times. I'm  
24 trying to remember a specific instance, but that is incorrect.

25 Q Can you remember a specific time where you have taken

1 disciplinary action?

2 A Other than the example here, off the top of my head, I  
3 can't remember anything other than discussing this with Sarah  
4 at length that her behavior was inappropriate.

5 MR. FAYE: May I have a moment, Your Honor, please?

6 JUDGE CARISSIMI: You may. Let's go off the record and  
7 you can tell me when you're ready, Mr. Faye.

8 (Off the record.)

9 BY MR. FAYE:

10 Q Mr. Mitchell, do you recall telling Board Agent Christy  
11 Bergstresser in your affidavit dated November 10, 2015, that  
12 over the years Kelly's has had issues where students have  
13 complained that they do not have proper service, the bartenders  
14 generally indicate that they will not serve those who do not  
15 tip, and then I -- then you correct them that that is not  
16 appropriate?

17 A Yes.

18 Q Is that accurate?

19 A Yes, it is.

20 Q Is it correct that before Robin Helms was hired that you  
21 told the bartenders that to not serve a customer who did not  
22 tip that you cannot discriminate like that but you have not  
23 taken disciplinary action?

24 JUDGE CARISSIMI: Do you understand the question, sir?

25 THE WITNESS: I don't. Before she was hired, did I say



1 this to someone?

2 MR. FAYE: Yes.

3 JUDGE CARISSIMI: Could you repeat that, Mr. Faye?

4 BY MR. FAYE:

5 Q Well, first, is it correct that before Robin Helms was  
6 hired in about March 2014 that you told a bartender that did  
7 not serve a customer who did not tip that you cannot  
8 discriminate like that?

9 A I don't -- if I knew that they did not serve someone, I am  
10 sure that I said you cannot treat people like that.

11 Q Do you recall telling Christy Bergstresser in your  
12 affidavit that within the last 18 months, I recall there being  
13 a complaint that someone was not being served and I  
14 specifically remember that the bartender said the customer did  
15 tip, and I recall telling that bartender that you cannot  
16 discriminate like that, but you do not remember if there was  
17 any discipline. Do you recall telling Ms. Bergstresser that?

18 A Yes.

19 Q Is that accurate?

20 A Yes.

21 Q Is it correct that generally the Employer just wants such  
22 bartenders to correct their behavior?

23 A Yes.

24 Q Is it correct that before April 30, 2015, you never met  
25 with Robin Helms regarding her job performance?

1 A True.

2 Q As to the shift schedules that are prepared weekly, is it  
3 correct that you have had last-minute changes where you have  
4 been involved?

5 A Me, personally?

6 Q Yes, because of --

7 A Sure, maybe at times, I'm the owner of the restaurant.

8 Q Well, hear the whole question.

9 JUDGE CARISSIMI: Wait until he finishes his question,  
10 sir.

11 THE WITNESS: Sorry, I didn't realize. I thought he was  
12 done.

13 BY MR. FAYE:

14 Q The whole question, let me repeat. Have there been  
15 circumstances after the issuance of the weekly work schedule  
16 where you have been involved where there were changes made to  
17 the shift schedule for the bartenders because of a disciplinary  
18 issue or a personal issue that the bartender has?

19 A Probably, yes.

20 Q Is it rather common after the schedule comes up, is  
21 issued, and the bartenders now see their shifts that they will  
22 switch with each other for certain shifts?

23 A The rules is if they can get their shifts covered after  
24 the schedule comes out, so it may happen from time to time.

25 Q Are you aware of instances where a bartender has switched

1 after the schedule came out because she or he was ill?

2 A Sure, yes.

3 MR. FAYE: Your Honor, could I have one more moment,  
4 please? I'll see if I have concluded.

5 JUDGE CARISSIMI: Off the record.

6 (Off the record.)

7 MR. FAYE: Nothing further at this time, Your Honor, of  
8 this witness. Thank you very much.

9 THE WITNESS: You're welcome.

10 JUDGE CARISSIMI: Mr. Schadler, you can ask questions now  
11 within that scope or you can reserve examination of Mr.  
12 Mitchell to your case, whatever you prefer.

13 MR. SCHADLER: What would the Court prefer, because I have  
14 a full examination of Mr. Mitchell and of Ms. Mitchell? I  
15 would go to the Court's deference.

16 JUDGE CARISSIMI: I think it makes more sense to just  
17 examine him on your case.

18 MR. SCHADLER: I have no problem with that, Your Honor.  
19 Certainly, there is a great number of things to bring in, some  
20 specific to this -- no, actually, if I could just get one or  
21 two things out on this. I wrote a note down and I want to make  
22 sure that this --

23 JUDGE CARISSIMI: Yeah, that's fine. You can do that as  
24 long as it's within the scope of the questions asked by Mr.  
25 Faye.

1 MR. SCHADLER: Yes.

2 JUDGE CARISSIMI: You may proceed.

3 MR. SCHADLER: I will not get into anything outside the  
4 scope, Your Honor. And to make it clear for the record, I do  
5 intend to call Mr. Mitchell on my case in chief, so I don't  
6 want to prevent any right I may have in that regard.

7 CROSS-EXAMINATION

8 BY MR. SCHADLER:

9 Q Shift schedules, were you involved in creating the shift  
10 schedules for Robin Helms or was that tasked to somebody else?

11 A The shift schedules are made by the restaurant manager and  
12 Angie, my wife.

13 Q Did you have any involvement in that at all during this  
14 time?

15 A Little to none, really.

16 Q You said that you had heard some complaints about Robin  
17 and I want to draw you to that portion of it. What complaints  
18 did you hear specifically about from Robin to Ryan about the  
19 shift scheduling?

20 A She wanted longer shifts. And Robin was working Thursday,  
21 Friday, and Saturday. She told us that she had conflicts  
22 during the earlier part of the week because she had her child.  
23 And the shifts, the way they're scheduled at the restaurant are  
24 10:00 to 7:00 and 7:00 to close, or sometimes maybe someone  
25 will come in at 5:00 if there was a special event. And Robin,



1 to my knowledge, was already working Thursday, Friday, and  
2 Saturday shifts from 7:00 to close. But Robin did tell me that  
3 she wanted longer shifts and I did pass that along to Ryan  
4 Henry, the manager at the time.

5 Q Did Robin ever bring anything to your attention regarding  
6 other people wanting better shifts?

7 A She did not.

8 Q Did she ever advocate on behalf of any of her co-workers  
9 for better shifts?

10 A She did not. She only spoke to me about her desire for  
11 longer shifts.

12 Q Are you aware of any conversation she had with Angie, or  
13 with Ryan, or any manager in that regard as pertains to her  
14 desire to have her co-workers get better shifts?

15 A No, I'm not.

16 Q Were you aware of any conversations that she had with  
17 either yourself, Angie, or with Ryan, or any manager regarding  
18 her and her co-workers' complaints about the shift schedule in  
19 any regard?

20 A I am not aware of any.

21 Q Did that, and we're jumping the gun a bit here but I want  
22 to put this on the record right now so it's clear, did anything  
23 regarding her request for shift schedule factor into your mind  
24 as pertained to your discussion with her on April 30, 2015,  
25 termination?

1 A Absolutely not.

2 Q What was the reasons that she eventually separated, not to  
3 get too far ahead but just so it's clear, what were the reasons  
4 you sat her down on that day?

5 MR. FAYE: Well, I do think that one is beyond the scope.

6 JUDGE CARISSIMI: It is.

7 MR. SCHADLER: Okay. I'll reserve that.

8 JUDGE CARISSIMI: This is more for direct examination.

9 MR. SCHADLER: And with that, Your Honor, I have nothing  
10 further as pertains to this issue.

11 JUDGE CARISSIMI: Mr. Mitchell, you are excused for now.

12 MR. FAYE: I have one question, Your Honor.

13 JUDGE CARISSIMI: Oh, you do, within that scope, okay.

14 REDIRECT EXAMINATION

15 BY MR. FAYE:

16 Q Is it correct, do you recall telling Christy Bergstresser  
17 that other employees' likely complained about their tips to  
18 Ryan Henry?

19 A Vaguely, yes. Probably, I did say that, I'm sure.

20 Q Is that accurate?

21 A That's accurate.

22 Q Thank you very much.

23 MR. SCHADLER: I'm sorry, Your Honor, one point of  
24 clarification.

25 RECROSS EXAMINATION

1 BY MR. SCHADLER:

2 Q What do you mean by complaints?

3 A Bartenders really wanting the best shifts. They always  
4 want Thursday, Friday, and Saturday night shifts. Sometimes  
5 people have to work a Monday or Tuesday in a restaurant, has to  
6 open, so I know the manager and Angie try to balance out the  
7 better shifts with some of the folks that chip in and take the  
8 not so great shifts. So it's the nature of the industry that  
9 people want to maximize their return. It's human nature. I  
10 mean that's just what happens.

11 JUDGE CARISSIMI: Off the record.

12 (Off the record.)

13 JUDGE CARISSIMI: At this point, you can be excused,  
14 Mr. Mitchell. You may step down.

15 (Witness excused.)

16 JUDGE CARISSIMI: Let's go off the record.

17 (Off the record.)

18 MR. FAYE: Your Honor, I would now like to call as the  
19 third witness for the General Counsel as a 611(c) witness,  
20 Angelia Mitchell.

21 JUDGE CARISSIMI: Ms. Mitchell, if you would please stand  
22 for a moment and if you would raise your right hand?

23 (Whereupon,

24 ANGELIA MITCHELL,

25 was called as a witness by and on behalf of the General Counsel

1 and, after having been duly sworn, was examined and testified  
2 as follows:)

3 JUDGE CARISSIMI: Please have a seat. Mr. Faye, you may  
4 proceed.

5 MR. FAYE: Thank you.

6 DIRECT EXAMINATION

7 BY MR. FAYE:

8 Q Please state your name and address for the record.

9 A It's Angie Mitchell, 632 Overhill Road, Ardmore,  
10 Pennsylvania, 19003.

11 Q Is your legal first name Angelia?

12 A Yes.

13 Q A-N-G-E-L-I-A, correct?

14 A Yes.

15 Q What is your position with Kelly's Taproom?

16 A I am the bookkeeper, the general manager, the overall  
17 operations manager.

18 Q Thank you. Are you married to Eugene Mitchell?

19 A Yes.

20 Q Is it correct that on April 9, 2015, you hired three  
21 bartenders?

22 A Around that day, correct, yes.

23 Q Is it correct that employees were concerned about -- is it  
24 correct that bartenders were concerned about what shifts they  
25 would be allowed to keep and what shifts they would have due to



1 the new hires of April 9, 2015?

2 MR. SCHADLER: Objection, Your Honor, just so we can  
3 identify which, when we say bartenders, who specifically we're  
4 talking about here.

5 JUDGE CARISSIMI: I'm going to sustain the objection. If  
6 you have specific bartenders, that's one thing, Mr. Faye. It's  
7 too vague for my purposes just to reference to bartenders.

8 BY MR. FAYE:

9 Q Are you aware of particular bartenders who were concerned  
10 about what shifts they would be allowed to keep and what shifts  
11 they would have due to the hiring of new bartenders?

12 MR. SCHADLER: Again, I object to vagueness.

13 JUDGE CARISSIMI: This is 611(c). You can ask leading  
14 questions. If you have names you want to ask her about, go  
15 ahead. I think that's a better approach. I'm going to sustain  
16 the objection.

17 MR. FAYE: Well, I was going to follow-up, Your Honor,  
18 with more specific employees, but --

19 JUDGE CARISSIMI: Let's do that then because I've  
20 sustained the objection. I think that's the point, be more  
21 specific.

22 BY MR. FAYE:

23 Q Are you aware of employees -- are you aware of bartenders  
24 who were concerned about the shifts that they would be allowed  
25 to keep and the shifts they would have due in light of the new

1 hirings of April 9th?

2 MR. SCHADLER: Objection, Your Honor. I think the  
3 question got more vague.

4 JUDGE CARISSIMI: It's the same question, Mr. Faye.  
5 Sustained.

6 BY MR. FAYE:

7 Q Are you aware of Robin Helms having concerns about what  
8 shifts she would be allowed to keep and what shifts that she  
9 would have due to the new hires of April 9, 2015?

10 A Yes.

11 Q Were you aware of the concerns --

12 JUDGE CARISSIMI: Let's go off the record.

13 (Off the record.)

14 JUDGE CARISSIMI: Proceed, Mr. Faye.

15 MR. FAYE: Thank you.

16 BY MR. FAYE:

17 Q Were you aware that bartenders Sarah Clark, Kris Flood,  
18 and Chris Healy concerned about what shifts they would be  
19 allowed to keep and what shifts they would be allowed to keep  
20 due to the new hires of April 9, 2015?

21 A Can you name those three again?

22 Q Kris Flood, Chris Healy, Sarah Clark.

23 A The three combined or each one individually?

24 JUDGE CARISSIMI: Well, do your best to answer the  
25 question that is asked.

1 THE WITNESS: I know Kris Flood, yes. Chris Healy,  
2 absolutely not. Sarah Clark, absolutely not.

3 BY MR. FAYE:

4 Q What other employees are you aware of -- what other  
5 bartenders are you aware of who had concerns about what shifts  
6 they were allowed to keep and what shifts they would have in  
7 view of the new hiring of three bartenders on April 9, 2015?

8 A None other than those two, Robin and Kris, Robin Helms and  
9 Kris Flood.

10 Q Thank you. Is it correct that bartenders complained to  
11 Ryan Henry about shift schedules from what you know?

12 MR. SCHADLER: Objection, Your Honor.

13 JUDGE CARISSIMI: Overruled.

14 THE WITNESS: I'm aware they talked to him sometimes about  
15 scheduling. I'm unaware of real complaints about the schedule  
16 other than Kris Flood and Robin Helms.

17 BY MR. FAYE:

18 Q Are you aware that Kris Flood and Robin Helms complained  
19 to Ryan Henry about shift schedules?

20 A Yes, regarding the addition of the three new hires, yes.

21 Q Are you aware that those two bartenders complained to Ryan  
22 Henry about other matters related to shift schedules?

23 A No.

24 Q At the April 30, 2015, meeting that you and Mr. Mitchell  
25 and Mr. Henry had with Ms. Helms, is it correct that Mr.

1 Mitchell and you told Ms. Helms that she had been complaining  
2 to everyone except the two of you about the work environment  
3 and her job?

4 A Not exactly, no.

5 Q Do you recall giving an affidavit to Board Agent Christy  
6 Bergstresser on November 10, 2015, in which you stated --

7 JUDGE CARISSIMI: Well, first of all, let's get an answer  
8 to that question.

9 THE WITNESS: Yes.

10 JUDGE CARISSIMI: This needs to be authenticated before  
11 you go any further, sir.

12 MR. FAYE: Yes.

13 THE WITNESS: Yes, I'm aware of that statement.

14 BY MR. FAYE:

15 Q Thank you. Do you recall giving testimony in that  
16 affidavit that you and -- that "we," which I am taking to mean  
17 Mr. and Mrs. Mitchell, told Robin Helms in the April 30, 2015,  
18 meeting that she had been complaining to everyone except us  
19 about the environment, the late night college students, and her  
20 job?

21 A That's correct, the late night business and her job,  
22 that's correct.

23 Q It says just so I have it outright, is it correct when you  
24 said you and Mr. Mitchell -- is it correct that you and Mr.  
25 Mitchell told Ms. Helms on April 30, 2015, that she had been



1 complaining to everyone except the two of you about the  
2 environment, the late night college students, and her job?

3 A That's correct.

4 Q Thank you very much.

5 JUDGE CARISSIMI: Anything further?

6 MR. FAYE: No.

7 JUDGE CARISSIMI: Mr. Schadler, in that range, do you have  
8 any?

9 MR. SCHADLER: Yes, briefly, Your Honor, briefly.

10 CROSS-EXAMINATION

11 BY MR. SCHADLER:

12 Q I'd like to take you back to the conversation about Ms.  
13 Flood's and Ms. Helms' complaints regarding scheduling. Were  
14 those complaints about the bartender schedules or about their  
15 individual schedules?

16 A Individual schedules.

17 Q Were those complaints in relation to improvements of the  
18 bartender's position or their own positions?

19 A Their own positions.

20 Q Did they advocate for each other or just themselves?

21 A It seemed each just each individually.

22 Q I know Mr. Faye read a portion of your discussion with Ms.  
23 Helms at the meeting in question and I don't want to get into  
24 too much depth here only to say that were there other reasons  
25 why Ms. Helms was down there?

1 A Absolutely.

2 Q Were there other reasons articulated about -- I'm sorry,  
3 were you saying -- you just went like that. Okay, I'm sorry.  
4 I thought you went like that and I thought --

5 MR. FAYE: Well, I object because it's beyond the scope.  
6 I think this belongs on his case.

7 MR. SCHADLER: Your Honor, there is an impression left  
8 here that this was the reasons given at the meeting. I want to  
9 be very clear that there's other reasons we will get into.

10 JUDGE CARISSIMI: I'm sure there is. But, again, I think  
11 those will be the subject of your direct examination on your  
12 case in chief.

13 MR. SCHADLER: I'll take care of that, Your Honor. Thank  
14 you. Nothing further then at this time for Ms. Mitchell.  
15 We'll take care of it on the direct.

16 JUDGE CARISSIMI: Ms. Mitchell, for now you are excused as  
17 a witness. You may step down.

18 THE WITNESS: Thank you.

19 (Witness excused.)

20 MR. SCHADLER: And, Your Honor, I'd just like to note for  
21 the record I will be reserving the right to recall Ms. Mitchell  
22 on those issues, in our case in chief.

23 JUDGE CARISSIMI: Absolutely.

24 MR. SCHADLER: Thank you, Your Honor.

25 JUDGE CARISSIMI: All right. So now the General Counsel

1 is prepared to rest, correct?

2 MR. FAYE: Except that I had said, Your Honor, before we  
3 started that because I, well, yes, Your Honor, I'm prepared now  
4 to rest. I was going to comment about the documents, but we  
5 did review them at the beginning to save the time and I  
6 appreciated that. That's all the witnesses I have at this  
7 time.

8 JUDGE CARISSIMI: In other words, you have had a chance to  
9 review the documents, there's no other documents that you plan  
10 on introducing at this time?

11 MR. FAYE: Not at this time. I understand that, frankly,  
12 the two witnesses I just called on 611(c) are being called by  
13 Respondent anyway.

14 JUDGE CARISSIMI: Right, okay. We're going to go on the  
15 record, you're going to rest, and then we're going to go back  
16 off the record -- well, you know what, bring in Ms. Heyward now  
17 so we don't have to --

18 (Off the record.)

19 JUDGE CARISSIMI: Is the General Counsel prepared to rest?

20 MR. FAYE: I do.

21 JUDGE CARISSIMI: Very good. Counsel for the Respondent  
22 is now ready to begin his case?

23 MR. SCHADLER: Absolutely, Your Honor.

24 JUDGE CARISSIMI: You may call your first witness.

25 MR. SCHADLER: We would call Chelsea Heyward to the stand,

1 please.

2 JUDGE CARISSIMI: Ms. Heyward, if you would please step up  
3 to the witness stand? If you would please raise you right  
4 hand?

5 (Whereupon,

6 CHELSEA HEYWARD,  
7 was called as a witness by and on behalf of the General Counsel  
8 and, after having been duly sworn, was examined and testified  
9 as follows:)

10 JUDGE CARISSIMI: Please have a seat. Mr. Schadler, you  
11 may proceed.

12 MR. SCHADLER: Thank you, Your Honor.

13 COURT REPORTER: Could you spell your first name for me?

14 THE WITNESS: C-H-E-L-S-E-A.

15 COURT REPORTER: And it's H-E-Y-W-A-R-D?

16 THE WITNESS: Um-hum.

17 COURT REPORTER: Thank you.

18 DIRECT EXAMINATION

19 BY MR. SCHADLER:

20 Q Ms. Heyward, thank you very much for coming today. I know  
21 you've been through some very difficult times and I appreciate  
22 you showing up. If you could please tell His Honor where are  
23 you currently employed?

24 A I work for Route Restaurant, which is 1206 Frankfurt Ave.

25 Q What is your position there?



1 A I am a bartender.

2 Q How long have you been in the food service industry?

3 A 15 years.

4 Q And as I understand, you're the mother of a young child?

5 A Yes.

6 Q I'd like to take you back to your time at Kelly's Taproom.

7 Do you recall that time?

8 A Um-hum.

9 MR. FAYE: Is that a yes?

10 THE WITNESS: Yes.

11 JUDGE CARISSIMI: Try to remember yes or no, okay? Thank  
12 you.

13 BY MR. SCHADLER:

14 Q They're taking down everything you're saying so it's very  
15 tough to take down a nod.

16 A No problem.

17 Q When did you first come to be at Kelly's Taproom? How did  
18 you come about being there?

19 A I found an article or like an ad on Craig's List where  
20 they were looking to hire some bartenders and servers, so I  
21 applied and came in, interviewed, and got a phone call back  
22 that I was hired.

23 Q Let me kind of back you up there and slow you down. Were  
24 you working anywhere at the time that you found that ad?

25 A No. I was a stay-at-home mom.

1 Q You'd just had your child, correct?

2 A Right.

3 Q Who did you interview with at Kelly's?

4 A Gene and his wife, Angie.

5 Q What was your impression of them when you interviewed with  
6 them?

7 A They were really nice.

8 Q What was your impression Kelly's?

9 A I had I guess I would say I thought about it as just a  
10 typical bar, like it looked cozy. I wasn't really familiar  
11 with what I was going to encounter, like what age bracket, but  
12 it looked like something that I'd be comfortable working in and  
13 so I wanted to work there.

14 Q When you said you met with Gene and Angie and they were  
15 nice, can you describe a little bit about that? How was your  
16 impression about how they were approachable or not?

17 A Yeah, I did think that they were approachable. They  
18 seemed very interested in knowing that I was a new mom, which  
19 is kind of hard to explain to employers, and so they seemed  
20 really warm and welcoming at the idea. And they knew that I  
21 hadn't worked for a certain period of time because I was a new  
22 mom and that I wanted to get back into the workforce. I kind  
23 of expressed that I wanted to interact with adults, that I was  
24 only interacting with a child all the time, and it was really  
25 important to me to kind of get back in the workforce and be

1 employed again.

2 Q Were they understanding about you coming back in as a new  
3 mom?

4 A Yes. They even like worked with the fact that I only had  
5 certain availability because I was a mom and I'm a single mom,  
6 so it's kind of hard to tell people that because it kind of  
7 comes across as though you have very little availability, which  
8 sometimes you do. But they didn't really give me any hard time  
9 about it. They worked with my schedule 100 percent, just were  
10 very welcoming to me.

11 Q You said you eventually accepted a position there. Were  
12 you required to go through any training?

13 A Yes.

14 Q How did that training take place? Was there anyone you  
15 were assigned to?

16 A Yes.

17 Q Who were you assigned to?

18 A Robin.

19 Q Do you see the person you identified as Robin in court  
20 today?

21 A Yes.

22 Q Could you please identify her for the Court and the  
23 record?

24 A To my right.

25 MR. SCHADLER: Your Honor, gesturing over --

1 JUDGE CARISSIMI: Do you know Robin's last name?

2 THE WITNESS: I don't.

3 JUDGE CARISSIMI: Do you know Angie and Gene's last name?

4 THE WITNESS: At the moment, no. Usually, yes. I'm  
5 having a brain fart at the moment.

6 JUDGE CARISSIMI: Does Mitchell sound familiar?

7 THE WITNESS: Yes.

8 JUDGE CARISSIMI: All right, very good. You may proceed.

9 MR. SCHADLER: And Your Honor I'd like the record to  
10 reflect that she identified Robin Helms.

11 JUDGE CARISSIMI: Yes.

12 MR. SCHADLER: Thank you.

13 BY MR. SCHADLER:

14 Q How is it that you came to meet Robin? What were the  
15 circumstances?

16 A She was introduced to me as my trainer when I came in.  
17 That I would have approximate I believe it was two or three  
18 shifts just to get acclimated into the system, learn their  
19 computers, the menu, where things were in the computers so that  
20 once I was on my own I was going to be comfortable to work  
21 behind the bar.

22 Q Did you work in close proximity with Robin?

23 A Yes.

24 Q If you could please describe what your impression was of  
25 Robin?



1 A My initial impression was that she was stressed out about  
2 new hires, that she wasn't really happy perhaps with the new  
3 hires, like myself, being there. And that she was stressed  
4 out, that she was stressed.

5 Q Did she make any statements to you regarding new hires?

6 A More along the lines of that she needed to talk to the  
7 management about making sure that it did not affect her  
8 scheduling whatsoever.

9 Q Do you recall what her attitude was like and what she was  
10 like to work with?

11 A She wasn't happy. I think that she just had a really bad  
12 stress level. I think that my interpretation of it was that  
13 when I got hired it was the end of the busy season for the  
14 Taproom. A lot of the clientele comes from Villanova,  
15 students, and so it was winding up the end of the school year,  
16 so I think that the stress level probably came from the fact  
17 that I came maybe two to three weeks before the big boom  
18 happened at the end of the year and then it slows down for the  
19 summer. And so my interpretation from what she expressed to me  
20 was that there was not going to be enough scheduling for new  
21 hires, that there was going to be very little shifts for those  
22 people who were even employed there at the time, and that she  
23 didn't really think that it was necessary to have hired anyone  
24 else because it would lessen her shifts or, you know, her  
25 shifts.

1 Q And specifically, I know you talked about your impression,  
2 what were some specific comments that Robin made in those  
3 regards?

4 A She commented that new hires better not affect her  
5 scheduling, she commenting when I was hired that we had  
6 scheduling that was kind of like earlier shifts, mid shifts,  
7 and later shifts, 5 o'clock, 7 o'clock, if I remember, and 9  
8 o'clock. And that she had been there for a year. She had not  
9 been scheduled a 5 o'clock shift. And if she found that I was  
10 scheduled a 5 o'clock shift and that she hadn't been that she  
11 was going to be really pissed off about it, pardon my French,  
12 but that was basically what was said.

13 JUDGE CARISSIMI: That's okay. You can use whatever  
14 language was used. That's fine.

15 THE WITNESS: That she was going to be really pissed off  
16 about it because she didn't think that it would be fair that if  
17 I were to be given, you know, I guess the 5 o'clock shifts were  
18 kind of looked at as the wanted shifts. The earlier you came,  
19 the more money you made. So with her saying that she hadn't  
20 ever been scheduled anything prior to 9 o'clock, she felt as  
21 though she had seniority and if I was scheduled that she would  
22 be really upset with it.

23 BY MR. SCHADLER:

24 Q And she told you, you said, she had never been scheduled  
25 earlier than 9 o'clock?

1 A Yes.

2 Q Did she make any other comment about the place, Kelly's  
3 Taproom, or about Gene and Angie specifically that you  
4 remember?

5 A She just wasn't happy with really anything there. It was  
6 a lot of complaining about -- just a lot of complaining about  
7 not being there or about being there. I remember her saying  
8 like within my first day or two like if you're really unhappy  
9 then why don't you look for something else in terms of  
10 employment. And I remember feeling like the only things that I  
11 got from her really expressed that she wasn't happy. And I  
12 also expressed, well, if it's that bad here, I will learn that  
13 very quickly and I'll keep it moving. Like I have a son, so if  
14 it's really that bad, I'm going to have to go, too. So if you  
15 feel like it's that bad here, find another job.

16 Q What were the comments, if you recall, that she was making  
17 that led you to believe that she was this unhappy?

18 A She really kind of just like she wasn't happy with the  
19 clientele, not all clientele. I remember like I think it was  
20 either my first or second day of training there were two black  
21 girls that came in --

22 Q We're going to get to that specifically, if I could  
23 isolate that, but are there any other comments other than that?

24 MR. FAYE: I don't understand, Your Honor, why counsel is  
25 cutting off the witness. The witness is in the middle of her

1 sentence.

2 JUDGE CARISSIMI: I think the answer was becoming  
3 nonresponsive to his question.

4 MR. FAYE: I see, okay.

5 JUDGE CARISSIMI: I thought it was appropriate.

6 BY MR. SCHADLER:

7 Q Before we get to that, any specific comments you remember  
8 her making?

9 A I just remember her really being unhappy with work. At  
10 the present time there might have been something exactly that  
11 she said but it's not in my head at this very moment. I just  
12 remember her like saying that she was unhappy with the place,  
13 that she really didn't have anything nice to say about Ryan,  
14 who was our manager at the time. He wasn't really qualified,  
15 so she really never said anything nice about that. It was my  
16 first day of training. She went downstairs and she kind of  
17 cornered Ryan with another employee that we had there who came  
18 in on her day off and they basically kind of aggressively told  
19 him like what's our schedule, our schedules better not be  
20 affected, there are new people being hired here, and then she  
21 came up and she told me that she had told our manager at the  
22 time, Ryan, that her schedule better not be affected. I  
23 remember being told there was another employee besides myself  
24 that had been hired that she --

25 JUDGE CARISSIMI: He asked you about what Ms. Helms said.



1 Are you telling me what Ms. Helms said or are we off on another  
2 conversation now?

3 THE WITNESS: Yes. I only talked to her.

4 JUDGE CARISSIMI: All right. I think it's time for  
5 another question.

6 BY MR. SCHADLER:

7 Q You were starting off about Ms. Helms saying another  
8 employee was hired. Can you please continue with what you were  
9 saying there?

10 A That that employee only trained one day and never came  
11 back, and she trained with her as well.

12 Q You had mentioned an incident involving two patrons.  
13 Could you please detail that and tell us what happened?

14 A So I was training with Robin and two black girls came into  
15 the bar. They were celebrating the fact that they were  
16 finalizing with school. She recognized them and she basically  
17 said that she was not going to serve them, that they never  
18 tipped her, and so she refused to give them service. She was  
19 like if you want to wait on them, feel free to wait on them,  
20 but I'm not doing it.

21 Q Do you recall her exact words that she used to the best of  
22 your recollection?

23 A She basically just said I'm not waiting on those two black  
24 girls and was like if you want to wait on them you can but I'm  
25 not going to do it. I went over and I waited on them. They

1 were sitting by the window. It was like a high-top that had  
2 like six chairs at it. They were with other people. They  
3 started a tab with a credit card. They each got two drinks.  
4 And at the end of it when they were paying she said, let me  
5 guess, they didn't tip you. And I said, yes, they did, and  
6 they actually tipped really well.

7 And she said to me, well, it must be because you're black,  
8 too. And I said that's really ridiculous. And then I just  
9 kind of like shoved it underneath how I felt about it because I  
10 felt like for you to tell a black girl that you're not going to  
11 wait on two other black people, I would think that you would  
12 know that that would be offensive to me whether you didn't or  
13 not. So when she told me the only reason I probably got tipped  
14 by them was because I was also black, too, the whole situation  
15 was offensive.

16 Q How did you feel about that situation?

17 A I didn't really know her but it hurt my feelings. And I  
18 feel like I'm used to things like that unfortunately, but it  
19 did impression me as to where her mind state was.

20 Q What was that impression?

21 A That she had no problems making racist comments in front  
22 of an African American person without thinking twice about it.  
23 I kind of feel like -- it almost felt like she forgot I was  
24 black, like she just really said it as though I was a fellow  
25 white person. It was like I'm not waiting on those black

1 people. And then as I did it, it was kind of like, oh, I get  
2 you didn't get tipped, did you. And I said, yes, I did, and  
3 they tipped me well. And she was like, well, then it's only  
4 because you're black, too.

5 Which really kind of surprised me, because we also had a  
6 night when I trained with her where we had staff come in that  
7 were bouncers and they were black males. It was one of their  
8 birthdays. And she was really excited when they came in. So  
9 it threw me off because when I was behind the bar and I saw  
10 them come in, I was like how is she going to react to them  
11 because she hadn't reacted well to the two African American  
12 girls that came in. But she knew them and they worked there as  
13 bouncers, so I guess she was like more comfortable with them.  
14 She was very nice to them and they were very nice to her, and  
15 they interacted, and laughed and joked, had drinks, food. It  
16 was one of the people's birthdays.

17 Q Did you ever express or -- let me back that up a second.

18 Did you make a decision based on that incident about your  
19 employment at Kelly's?

20 MR. FAYE: Objection.

21 JUDGE CARISSIMI: Overruled.

22 THE WITNESS: Yes.

23 JUDGE CARISSIMI: You can answer.

24 BY MR. SCHADLER:

25 Q What was your decision?

1 A It was really my whole training experience. I felt like,  
2 well, I only trained with her, with Robin, but I felt like the  
3 negativity really made me feel like I didn't want to work  
4 there. I felt like even when I was training behind the bar, at  
5 one point there was a Thursday night where there were kids from  
6 Villanova that were there and I remember standing behind the  
7 bar with gentleman who worked there, and Robin and another  
8 employee were behind the bar. There were four bartenders. I  
9 remember the guy who was standing with me was like do you see  
10 how they're giving you dirty looks. And I was like I don't  
11 care.

12 Q Who is they?

13 A It was Robin and another girl named Kris who worked there  
14 as well. And I was standing towards the entrance of the  
15 downstairs bar and they were standing all the way -- like the  
16 entrance of getting on the bar. They were standing on the far  
17 side, inside the bar, like near the entrance of Kelly's. I was  
18 standing behind there with the guy who worked with us and he  
19 made a gesture or a comment to me did I see the dirty looks  
20 that they were giving me. And I just really was like I don't  
21 care. But I really felt like I was nitpicked the whole time I  
22 was there. I wasn't welcome when I was there. I wasn't wanted  
23 when I was there.

24 Q By whom?

25 A By Robin. I also felt that way from Kris. And it made me



1 feel like I just started working again, I had the option to  
2 find something where I wasn't going to have anxiety because I  
3 already have a small child and I'm a single mom, and I go home  
4 to anxiety, so I didn't want to feel that way at work, too.

5 Q During this time are you speaking with Angie and Gene  
6 about it?

7 A I mean I didn't make it that far into working there. I  
8 was there a short amount of time. I tried to talk to Angie one  
9 day and she slipped in and out before I was able to speak to  
10 her, so I asked for her phone -- actually, I left a message  
11 with the girl who was working that day. I said could you tell  
12 Angie I really need to talk to her. Angie called me back  
13 within like 30 minutes, if that, and she asked me what was  
14 wrong. And I told her.

15 Q What did you tell her?

16 A I told Angie about the experience with the two girls  
17 during the training. I told her how I was being made to  
18 feel -- I never was really accepted there until I said I was  
19 leaving. And once everyone knew I was leaving it was like, oh,  
20 we're sad to see you go. But they weren't nice to me while I  
21 was there.

22 Q Who is they?

23 A It was Robin and Kris. That was the only people I really  
24 had --

25 JUDGE CARISSIMI: He asked you about a conversation with

1 Angie. Now is this all part of the conversation with Angie?

2 THE WITNESS: Yes. I told Angie all of this.

3 JUDGE CARISSIMI: All right. Counsel, maybe if you break  
4 up the questions. I'm having trouble following some of the  
5 testimony.

6 MR. SCHADLER: Yes, Your Honor.

7 MR. FAYE: Your Honor, I would like to know a time frame  
8 because it may have been that this took place after. I have  
9 reason to believe that this happened after.

10 JUDGE CARISSIMI: You'll get a chance to cross-examine.

11 MR. FAYE: Well, there's no time frame on this, on the  
12 questions. I wish there was a time frame.

13 JUDGE CARISSIMI: Again, if you have concerns about that,  
14 counsel, there is cross-examination. You may proceed.

15 MR. SCHADLER: Thank you.

16 BY MR. SCHADLER:

17 Q If you could, you said you told Angie about a concern you  
18 had with how you were treated. What specific concerns did you  
19 raise to her? And I would just narrow it down to this, what  
20 specific concerns did you raise to her about your treatment on  
21 that phone call?

22 A I raised the issue with the two girls that came in that I  
23 felt like she really clearly wasn't paying attention that her  
24 comments were to a black girl about not wanting to wait on  
25 black people.

1 JUDGE CARISSIMI: Who is she?

2 THE WITNESS: Robin.

3 JUDGE CARISSIMI: Thank you.

4 BY MR. SCHADLER:

5 Q Try to use names.

6 A Sorry. And the other thing that I raised was the negative  
7 energy that I felt came from Robin during my training  
8 experience because she just didn't have anything positive to  
9 say about Kelly's. She didn't have anything positive to say  
10 about her experience there. I felt like maybe it was a tactic  
11 in order to maybe I've seen to scare someone off from staying.

12 JUDGE CARISSIMI: Is that what you told Angie?

13 THE WITNESS: Yes.

14 JUDGE CARISSIMI: All right.

15 THE WITNESS: That I felt like I wasn't wanted to stay  
16 there.

17 BY MR. SCHADLER:

18 Q What was Angie's response to that?

19 A She felt really bad that I felt that way. I was also  
20 telling her at the same time that I was choosing to leave. She  
21 asked me if there was anything that I could do -- or that she  
22 could do in order to convince me to stay. I said that I had  
23 already received a position elsewhere, that I really  
24 appreciated her wanting me to stay but I really felt like the  
25 energy there was really negative and I wasn't interested in

1 staying.

2 Q Just so we're clear, was Robin still working there when  
3 you had this conversation with Angie, if you're aware?

4 A Yes.

5 Q Did you ever have any problem speaking with Angie about  
6 these kinds of issues?

7 A No.

8 Q Were you aware of any issues or were you belittled in any  
9 way for having this conversation with her?

10 A Not at all.

11 Q Did you ever speak to Gene about it?

12 A No. I talked to Angie.

13 Q Let me ask you this question. Did you stay -- how long  
14 did you stay on after that conversation, approximately?

15 MR. FAYE: Objection. I don't think it's been established  
16 that she was still employed at the time of the conversation.

17 THE WITNESS: I was employed.

18 BY MR. SCHADLER:

19 Q Well, let me ask the question. At the time of the  
20 conversation where you had said that you were leaving, were you  
21 still employed there?

22 A Yes.

23 Q Did you work past that conversation?

24 A Yes.

25 Q How long after that conversation?



1 A Approximately two weeks.

2 Q During that two weeks, did anything happen with Robin?

3 A She was terminated.

4 Q Approximately, and maybe the easiest way to do this would  
5 be when your last day was, how many days before your last day  
6 was Robin terminated?

7 A Approximately two weeks.

8 Q Can you please describe the atmosphere after Robin?

9 A It was a completely different atmosphere. The bartenders  
10 were dancing behind the bar, laughing, joking. It really just  
11 shed all the negativity was gone and it completely changed into  
12 an environment where I actually mentioned to the people who  
13 were working with me if it had initially been that kind of  
14 environment that I wouldn't have left, that I wouldn't have  
15 felt as though I needed to find another job because it was like  
16 a dark cloud lifted up and the negativity was gone. That was  
17 it.

18 Q When you were there with Robin, did she ever complain  
19 about -- you talked about complaints, I want to bring you back  
20 to that. Were her complaints to you towards her or her  
21 co-workers in the sense of whose interest she was representing?

22 A Her interest.

23 Q Did she ever complain about the bartenders in a group or  
24 was it focused on her position?

25 A It was focused on her.

1 MR. SCHADLER: Can I have one second, Your Honor?

2 JUDGE CARISSIMI: You may. Let's go off the record.

3 (Off the record.)

4 BY MR. SCHADLER:

5 Q You no longer have any financial ties to Kelly's at all?

6 A Not at all.

7 Q You don't collect a paycheck from Gene or Angie at all?

8 A Not at all.

9 MR. SCHADLER: I have nothing further, Your Honor. Thank  
10 you.

11 MR. FAYE: Can I have a minute, Your Honor.

12 JUDGE CARISSIMI: You may. How much time would you like,  
13 Mr. Faye?

14 MR. FAYE: Three minutes.

15 JUDGE CARISSIMI: We'll say five minutes. We're in recess  
16 for five minutes.

17 (Recess off the record.)

18 CROSS-EXAMINATION

19 BY MR. FAYE:

20 Q You stated you're working on Frankfurt Avenue.

21 A Um-hum.

22 Q Please say -- is that yes?

23 A Yes.

24 Q Is that in Philadelphia?

25 A Fishtown, Philadelphia, yes.

1 Q How long have you worked there?

2 A I have worked there for over a month, but I am part of the  
3 opening team. I open restaurants, so I'll be there for the  
4 time being, perhaps go to the next restaurant. I opened  
5 another restaurant in between Kelly's and where I am now.

6 Q Was that a restaurant in Manayunk?

7 A No.

8 Q In Philadelphia.

9 A No.

10 Q After you left Kelly's, did you work at a restaurant in  
11 the Manayunk section of Philadelphia?

12 A I did go to a restaurant for about two days, but got a  
13 really good job offer to open a restaurant right across the  
14 street from Sugarhouse and felt it was a really good  
15 opportunity for me, and went and did it.

16 Q You worked then on Delaware Avenue, it was a Mexican  
17 Restaurant?

18 A Yes.

19 Q So after Kelly's, you went to work for, if I understand  
20 right, you went next to work at a restaurant in the Manayunk  
21 neighborhood of Philadelphia, correct?

22 A For two days.

23 Q For two days. And then you went to work at a Mexican  
24 restaurant on Delaware Avenue in Philadelphia?

25 A Yes.

1 Q And now you're working at a restaurant in Frankfurt. Is  
2 it the Frankfurt section of Philadelphia?

3 A I don't know sections of Philadelphia. I'm not from here.

4 Q Frankfurt Avenue in Philadelphia?

5 A Yes.

6 Q Have you worked at any other places since you left the  
7 employer Kelly's?

8 A No.

9 Q Is it correct that you left Kelly's on May 2, 2015?

10 A I don't recall the exact date. I can tell you I think I  
11 trained for perhaps a week and the grand opening of the Mexican  
12 restaurant on North Delaware was -- I continued to work at  
13 Kelly's for approximately two weeks after letting Angie know  
14 that I wasn't going to stay because they were understaffed.  
15 They had also let Robin go. And I agreed to continue working  
16 shifts until all of the graduation stuff died down and they no  
17 longer needed several hands.

18 Q Are you aware whether or not Robin Helms was fired on  
19 April 30, 2015?

20 A I don't recall the exact date.

21 Q Are you aware or remember that you left Kelly's only a few  
22 days later?

23 A No, I didn't leave only a few days later.

24 Q Is it correct that you only worked a very short amount of  
25 time at Kelly's?



1 A I worked a short amount of time, approximately a month,  
2 month and a half or so.

3 Q Wasn't it closer to no more than three weeks?

4 A No, that's not true, because when I came there they needed  
5 more people. I didn't anticipate that they were going to let  
6 Robin go. So at that point when I talked to Angie and let her  
7 know that I was interested in going elsewhere, the manager,  
8 whose name was Ryan, came to me and said, look, can you just do  
9 me a favor and continue to work because we need help. And I  
10 continued working until he didn't need help anymore.

11 Q Were you thrilled that Robin was fired?

12 A No. I didn't feel -- I actually felt bad about it because  
13 I didn't want to feel like it had anything to do with my  
14 conversation with Angie. I wanted to talk to Angie about why I  
15 wanted to leave because I felt like if I wasn't comfortable  
16 then I should just go. I didn't feel like me feeling  
17 uncomfortable needed to affect her, but I really wanted to say  
18 this is why I'm leaving, because when I said I wanted to leave  
19 I gave a reason for why I felt like that was not the right  
20 place for me to work.

21 Q Did you feel that you caused Robin to be fired?

22 MR. SCHADLER: Objection, Your Honor.

23 JUDGE CARISSIMI: Sustained.

24 BY MR. FAYE:

25 Q Since Robin was fired before you left Kelly's, why didn't

1 you just stay there, continue to stay there?

2 A Because I took another position.

3 Q Could you not have declined that position and stayed at  
4 Kelly's? Did you sign a -- I mean couldn't you have declined  
5 it.

6 MR. SCHADLER: Objection, Your Honor.

7 JUDGE CARISSIMI: Sustained.

8 BY MR. FAYE:

9 Q Why didn't you -- is that the only reason that you did not  
10 stay at Kelly's afterwards because you took another job?

11 A Yes.

12 Q But you didn't start that job until after you left  
13 Kelly's, isn't that correct?

14 MR. SCHADLER: Objection, Your Honor, relevancy.

15 JUDGE CARISSIMI: Well, we've had testimony about that.  
16 All right, I'll permit that question. Overruled.

17 THE WITNESS: Can you ask the question again?

18 BY MR. FAYE:

19 Q You didn't begin at your new job until after you left  
20 Kelly's, correct?

21 A Yes. Because I went to them and said, look, I'm going to  
22 complete working here and I knew that -- when someone hires  
23 you, you're filling a position that they're counting on you.  
24 So when I was asked, hey, can you fulfill and help us until we  
25 get through this period, which is expected to be a very busy

1 period of the major college there, I felt obligated to say yes,  
2 I will help get through this period; once that period has  
3 subsided, I will go and start the orientation for my job that I  
4 have chosen to take and let go of Kelly's.

5 Q Weren't you aware that from what your comments are that  
6 the busiest season was May and the beginning of June of 2015  
7 when classes were winding down and graduation was occurring?

8 MR. SCHADLER: Objection, relevancy.

9 JUDGE CARISSIMI: What is the relevance of this question,  
10 Mr. Faye?

11 MR. FAYE: Well, I think that her departure reasons are  
12 questionable. She's painting herself as saving Kelly's, when  
13 actually she left them in a lurch, like dumping them right  
14 before the busy season.

15 JUDGE CARISSIMI: I'm going to sustain the objection.  
16 This case involves the termination of Ms. Helms. It doesn't  
17 involve the reasons why Ms. Heyward left, so I'm going to  
18 sustain the objection.

19 MR. FAYE: There's a lot of testimony about why she was  
20 leaving Kelly's.

21 JUDGE CARISSIMI: If you want to ask that question, I'll  
22 let you ask it.

23 MR. FAYE: Well, to me it's all part and parcel, but I  
24 understand your ruling. I'll go on.

25 BY MR. FAYE:

1 Q Ms. Heyward, isn't it a fact that you didn't like any of  
2 the employees of Kelly's?

3 A That's not true.

4 Q Do you recall -- did you feel that the employees of  
5 Kelly's were very mean?

6 A Some of them.

7 Q Who?

8 A I didn't think Robin was really nice. I didn't think --

9 Q Did you think she was very mean?

10 A Like I'm an adult so I don't gauge mean anymore. I find  
11 that I gauge unpleasant more than I would gauge mean, because  
12 mean doesn't have anything to do with whether I stay or not. I  
13 felt that there were people there who were unpleasant.

14 Q Who?

15 A I felt that Robin was unpleasant. I felt that Kris, who  
16 was also a co-worker, tended to be --

17 Q Kris Flood?

18 A I'm sorry?

19 Q The woman, Kris Flood, or the male, Chris Healy?

20 A The woman.

21 Q Kris Flood. Okay, go ahead, Kris you thought was, go  
22 ahead?

23 A Right. Really, those were the two people that I felt like  
24 were unpleasant to really be around. I didn't really think  
25 that -- I think that things I already testified about were mean



1 actions. Did I think that Robin was a mean person? I don't  
2 think that Robin is a mean person. I think that she was very  
3 frustrated about things and it wasn't coming off positively.  
4 But I also had discussions that weren't mean discussions.

5 Q Do you recall giving an affidavit to Christy Bergstresser  
6 that you dated December 1, 2015?

7 A I remember talking on the phone.

8 Q Do you remember signing your name to an affidavit, to a  
9 statement?

10 A Yes.

11 Q Do you remember indicating to her that when you began  
12 working at Kelly's, the employees were very mean?

13 A That's the person --

14 MR. SCHADLER: Objection.

15 JUDGE CARISSIMI: When you hear objection, then you have  
16 to wait until I rule on it. Okay? If I say overruled, that  
17 means you can answer. If I say sustained, don't answer. All  
18 right?

19 THE WITNESS: Okay.

20 MR. SCHADLER: Your Honor, I have never been provided  
21 copies of the statement. And if there is going to be reference  
22 to it, I appreciate the Board rules, but if they're going to  
23 reference a statement for any purpose in hearing, I would like  
24 an opportunity to review the statement so that I'd have a fair  
25 opportunity to either redirect the witness if it comes back to

1 me or in some way be able to test the veracity of the  
2 statements that he's making about that document.

3 JUDGE CARISSIMI: So far the witness has always, when  
4 there's been a reference to a statement, they've indicated  
5 that's correct. But the first time that doesn't happen then  
6 you're going to have to mark that affidavit as an exhibit. And  
7 then you're going to have to -- whether you introduce it or  
8 not, I don't care, but if we're going to have any substantive  
9 use of the affidavit or if you're going to attempt to use any  
10 part of that affidavit to impeach a witness' testimony, then it  
11 has to be marked as an exhibit for identification and counsel  
12 has to be shown that in case there is any use of the affidavit  
13 to ensure that the use is correct and that any statements read  
14 from the affidavit are in fact accurate.

15 MR. FAYE: Do you recall indicating -- I'd reserve  
16 commenting, Your Honor, because I don't think that that's  
17 accurate based on the rules and regulations of the Board. She  
18 is not a government witness that I called. I think there is a  
19 distinction under the rules, but still we haven't gotten there  
20 yet anyway.

21 JUDGE CARISSIMI: Right.

22 MR. FAYE: And I was in the middle of a question and  
23 perhaps you will remember her --

24 JUDGE CARISSIMI: I have a question. Do you remember  
25 signing an affidavit?

1 THE WITNESS: I do.

2 JUDGE CARISSIMI: Do you remember who you gave it to?

3 THE WITNESS: I put it in the mail.

4 JUDGE CARISSIMI: Mark that for identification. I want  
5 this witness to -- I want to be ensured that's her affidavit,  
6 if she recalls giving that affidavit.

7 MR. SCHADLER: And I would like an opportunity to look at  
8 it as well, if it's to be shown to the witness.

9 MR. FAYE: It wasn't my intention, Your Honor, to put this  
10 affidavit in as an exhibit.

11 JUDGE CARISSIMI: Well, if you're going to use the  
12 affidavit, then everybody else is very clear about the  
13 affidavit. I'm not satisfied that this witness is as clear, so  
14 I want the affidavit marked for identification and I want you  
15 to authenticate it with this witness so I'm satisfied that it's  
16 her affidavit. And then we'll go from there. So what General  
17 Counsel exhibit do you want to mark this?

18 MR. FAYE: Are you suggesting as part of your decision,  
19 Your Honor, that I need at this point to show the affidavit to  
20 Respondent's counsel?

21 JUDGE CARISSIMI: Like any other document, if you're going  
22 to have it authenticated, he needs to at least see it.

23 MR. FAYE: I wasn't asking for it at this time to be  
24 authenticated.

25 JUDGE CARISSIMI: But I am. You can't ask any further

1 questions until you authenticate it properly for me.

2 MR. FAYE: I'd like to talk to -- I'd like to go off the  
3 record so I can speak to upper management.

4 JUDGE CARISSIMI: All right, let's go off the record.

5 (Off the record.)

6 JUDGE CARISSIMI: Mr. Faye, are you ready to proceed?

7 MR. FAYE: Yes, I am, Your Honor.

8 JUDGE CARISSIMI: What do you choose to do with the  
9 affidavit?

10 MR. FAYE: Your Honor, I felt like I was in the initial  
11 stages only of questioning the witness to see if she recalled  
12 what she gave to the affidavit. If you -- so that was my  
13 intention, that's what I'd like to do. If you feel that that's  
14 not the best thing under the circumstances or at this point  
15 that you feel that you want that affidavit in already then --

16 JUDGE CARISSIMI: I don't want the affidavit into  
17 evidence. I want to make sure if you're going to refer to the  
18 witness' affidavit that the witness says that's my affidavit.  
19 Okay?

20 I want her to look at the signature, and the date, and the  
21 document and just to authenticate that, yes, that's my  
22 statement. Then you can go through, you can use it to refresh  
23 recollection. You can ask a leading question. But if you're  
24 going to read from the affidavit then Counsel has to have a  
25 copy of it and counsel has to make sure that any reading of

1 statements from the affidavit is accurate.

2 MR. FAYE: Of course, I did refer to affidavits for the  
3 two 611(c) witnesses.

4 JUDGE CARISSIMI: Right. And they said, yes, I gave an  
5 affidavit. But this witness' testimony is a little bit  
6 different in my view and this is -- I think this is different.  
7 And I just want to make sure before we go farther that -- I  
8 don't see the problem with having a witness assure us all that,  
9 yes, that's in fact my affidavit that you're asking me  
10 questions about.

11 MR. FAYE: Certainly not. But may I just say, Your Honor,  
12 respectfully, it wasn't my -- you have to realize it was not my  
13 intention to put it in as an exhibit. And even short of that,  
14 it wasn't my intention to turn it over to counsel for  
15 Respondent at any point really.

16 JUDGE CARISSIMI: I don't know what you're going to do  
17 with that affidavit and I don't think really you know at this  
18 point. It depends on the witness' answer. Correct?

19 MR. FAYE: Yes.

20 JUDGE CARISSIMI: And that's the thing. Once we get to  
21 the point of using the affidavit substantively, I have a  
22 procedure that I use. I will explain that to you when I get to  
23 it, but it involves you reading the affidavit and not the  
24 witness, if you get to that point, because you have it, you  
25 read what's in there, if you think that it's necessary to read



1 some portion of the affidavit. And counsel looks at it and if  
2 there is some disagreement I'll resolve it.

3 But at this point, we're back at square one and before we  
4 have any further questions about you reading from the affidavit  
5 and asking the witness is this true, let's make sure it's her  
6 affidavit. That's all I want to do, at this point.

7 MR. FAYE: And in doing so you want me to give a copy to  
8 counsel for Respondent.

9 JUDGE CARISSIMI: To look at. Not to copy it. Not to use  
10 it. Rule 613 says that the adverse party has a right to look at  
11 a document if you're going to use a prior statement. And  
12 you're using a prior statement.

13 MR. FAYE: Well, I guess under the rules as to when you  
14 need to show an affidavit to the other side, I was talking  
15 about 102.118(b)(1) and (2).

16 JUDGE CARISSIMI: No, this isn't Jencks. You're not  
17 producing the affidavit. This is authenticating an affidavit.  
18 You may use it in some fashion. And if you use the affidavit,  
19 counsel has a right to make sure that whatever quote, if you  
20 get to that point, from the affidavit is accurate. That's all  
21 I'm saying. He doesn't get the copy of the affidavit for his  
22 purposes. He can't make -- all he gets to do is look at it, at  
23 this point. And if you introduce part of it, then it's  
24 identified, then we go into the normal rules that apply when  
25 part of a document is introduced. And I'll address all that if

1 we have to. But I don't think it's that complicated, Mr. Faye.  
2 I'm just -- I want to make sure this witness says that's her  
3 affidavit. And then you can do what you want with it.

4 MR. FAYE: May I ask her a couple of questions before I  
5 get into the affidavit?

6 JUDGE CARISSIMI: You may.

7 MR. FAYE: And if I have to reach the affidavit, I'll  
8 certain do as you advise.

9 JUDGE CARISSIMI: All right, very good.

10 MR. FAYE: Are we on the record?

11 COURT REPORTER: Yes.

12 JUDGE CARISSIMI: We are on the record.

13 BY MR. FAYE:

14 Q Ms. Heyward, did you feel that when you began working at  
15 Kelly's that the employees were very mean because they felt  
16 they were going to lose their hours?

17 A Specific employees, yes.

18 Q Now I don't want to lead you. You mentioned Robin Helms  
19 and you mentioned Kris.

20 A Yes.

21 Q Are you aware that Kris' last name is Flood, the female  
22 bartender is Kris?

23 A I don't recall really learning anyone's last names there.

24 Q May I ask who else you were referring to when you said  
25 some employees?

1 A In terms of scheduling and how the negative energy from  
2 that.

3 Q Okay.

4 A Robin and female Kris.

5 Q Yes. May I ask, as I recall, did you have conversations  
6 with Sarah Clark?

7 A Last names, I don't remember, but there was --

8 Q Well, my --

9 JUDGE CARISSIMI: Let's let the witness answer.

10 THE WITNESS: There was a Sarah that worked there. I  
11 believe I worked one shift with her. She left. She moved.

12 JUDGE CARISSIMI: You may proceed.

13 BY MR. FAYE:

14 Q Are you aware of a Sarah that left Kelly's on May 17,  
15 2015, to go to New York City, to take another job?

16 A Yes.

17 Q You mentioned about training. Is it correct that you were  
18 trained -- you had some training from Robin Helms, is that  
19 correct?

20 A Yes.

21 Q But on your very first day of training, do you recall your  
22 trainer that very first day was actually Sarah?

23 A There was a day shift I remember not making the whole  
24 shift due to issues with my child. So it wasn't like I didn't  
25 really technically train. But, yes, I was there with Sarah.

1 Q When you were there with Sarah, do you recall Sarah  
2 complaining to you about shifts, about the topic of shifts and  
3 scheduling?

4 A I do remember Robin was not the only one who complained.  
5 Sarah also did feel as though -- she also had not so nice  
6 things to say about Ryan. She didn't think that he was -- that  
7 was our manager, that he was equipped for the position. And  
8 she really wasn't negative, though. She really expressed the  
9 fact that she was -- like what I really remember about Sarah  
10 was that she described herself as a nomad, that she had moved  
11 several times, and that this was just -- she didn't like to  
12 stay in one place. And so her moving to New York was just her  
13 moving to New York because she wanted to move to New York. Her  
14 moving to New York had nothing to do with Kelly's. She was  
15 going to be graduating from school --

16 Q Yes.

17 A -- and that this was just a job that she was holding onto  
18 until she finished school. She actually made a comment where  
19 she said that shifts were going to be opening up because she  
20 was no longer going to be there.

21 Q Right.

22 A And so she really didn't care what was happening there  
23 because she was going away.

24 Q In fact, do you recall her calling Ryan Henry to you a  
25 weasel?

1 A She did nickname him that, yes.

2 Q Do you recall on the first day when you were dealing with  
3 -- you were working with Sarah, of her telling you that she had  
4 no respect for Mr. and Mrs. Mitchell, that's Angie and Gene?

5 A I do recall her saying that she didn't have any respect  
6 for Ryan. As to recalling her saying she didn't have any  
7 respect for Angie or Gene, I don't recall that.

8 Q Do you remember on the second day of training with Robin  
9 Helms about confirming with Ms. Helms what Sarah Clark had told  
10 you about problems with shifts, scheduling the shifts?

11 A I remember sharing with Robin the nickname that Sarah gave  
12 to Ryan and kind of chuckling about it. And Robin kind of  
13 saying, yeah, that is a nickname that they have for Ryan, that  
14 he was in to real estate or something else and he was only  
15 supposed to be there for a short amount of time. That he was  
16 brought in because there was another manager who left on  
17 maternity leave and that he was only supposed to be there for a  
18 short time and that that girls who was on maternity leave chose  
19 not to come back. And so that's how Ryan got his long-term  
20 position there. And that he just wasn't qualified and so Sarah  
21 did not have any respect for him. She didn't think he did a  
22 good job.

23 Q Did Sarah indicate the name that Ryan Henry's predecessor  
24 who was out on maternity was Kristin Lang?

25 A I would honestly tell you I don't recall. The



1 conversation was literally very --

2 JUDGE CARISSIMI: No, he just asked if you remembered his  
3 -- if he ever said her name.

4 THE WITNESS: Okay, I don't remember.

5 JUDGE CARISSIMI: You answered the question.

6 BY MR. FAYE:

7 Q Thank you. Do you recall talking with Robin Helms on your  
8 second day about shift scheduling because both of you have  
9 children.

10 A Right.

11 Q Do you recall that?

12 A Yes.

13 Q Do you recall being thankful to -- give me one second. Do  
14 you recall telling Ms. Helms on the second night of training  
15 that you appreciated everyone's honesty or you appreciate  
16 Sarah's honesty and Robin's honesty regarding inconsistency in  
17 schedules and shifts at Kelly's because you have a son to  
18 support?

19 A I do.

20 Q Do you recall telling Ms. Helms that you were going to  
21 quit because you -- excuse me one second. Do you recall  
22 telling Ms. Helms that you were quitting because you were going  
23 to another bar to work and you were leaving Kelly's because you  
24 didn't like the customers?

25 A No.

1 Q Do you remember saying anything to her about the customers  
2 negatively?

3 A Do I recall saying something specifically? No.

4 Q No, nothing specific to Ms. Helms about not caring for the  
5 customers?

6 A No.

7 Q Is it correct that you felt, Ms. Heyward, that from the  
8 moment you got to Kelly's that you got the complete cold  
9 shoulder from every employee?

10 A No.

11 Q Did you shortly and almost immediately after becoming  
12 employed by Kelly's continue to look for other work?

13 A Yes.

14 Q Do you feel that your -- that you had a very bad personal  
15 relationship with Robin Helms?

16 A I don't feel I had a personal relationship.

17 Q After you left or even while you were an employee, for  
18 quite some time is it correct that you were Facebook friends  
19 with Robin Helms?

20 A Robin, we were Facebook friends. Before I left, I  
21 expressed the fact that I couponed. It was one of the ways I  
22 was able to provide for me and my son. She said that she  
23 didn't know that I actually knew how to do it and she wanted me  
24 to teach her. And I remember expressing that if she had  
25 actually taken the time to learn who I was as a person she

1 would have known that. But she didn't really care about  
2 learning who I was as a person, but I tried to like extend  
3 teaching her anyway so I befriended her on Facebook. I was  
4 leaving.

5 Q Did you become Facebook friends before you left Kelly's?

6 A I would assume so, because I don't know her last name,  
7 so --

8 Q Did that continue until recently?

9 A I have no idea. I don't really pay attention. I have  
10 5,000 friends on Facebook.

11 Q I see. Do you recall on your second night of training  
12 with Ms. Helms, do you remember her giving you a tip, giving  
13 you money that was tip money at the end of training?

14 A Yes.

15 Q May I ask was that about \$20 or was it \$20?

16 A It was either \$10 or \$20, I don't recall the exact amount  
17 but she did tip me.

18 Q I see. Is it correct you've worked as a bartender before  
19 Kelly's, is that correct?

20 A Yes.

21 Q Isn't it true that's very unusual for --

22 A Not at all.

23 Q Well, hear the question, please, first. I just want to  
24 know if it was very unusual for a trainee to receive part of  
25 the tips at that point.

1 A Not at all.

2 Q Not in your experience?

3 A No. I would always tip a trainee. I would feel guilty to  
4 have someone sitting there working, especially if they're doing  
5 an equal or semi-equal portion of work that may increase my tip  
6 bucket, I feel they deserve a portion, maybe not what I get but  
7 they deserve it and I would always tip a trainee.

8 Q I hear you.

9 A And I think most people would.

10 Q Did Sarah Clark give you a tip after the first day of  
11 training?

12 A She didn't make anything. It was a daytime and I wasn't  
13 really there but for a short period of time.

14 Q So is the answer no?

15 A No.

16 Q Thank you. Do you remember talking with a bartender named  
17 Troy about -- do you remember you and Troy agreeing that the  
18 staff at Kelly's was very unhappy?

19 A I remember Troy is the guy that I said was the male  
20 employee behind the bar when there was Chelsea, Troy, Kris, and  
21 Robin. Troy is the person that said do you see how they're  
22 giving you dirty looks at the other end of the bar and I said I  
23 don't care.

24 Q Do you recall, is it correct that you viewed Kris, one of  
25 the bartenders, as very nitpicky?

1 A Yes.

2 Q Is it correct that there were other, besides Robin and  
3 Sarah, that there was other folks involved in your training?

4 A No.

5 Q Is it correct that you felt that other employees talked  
6 about you and whispered about you, and that was one of your  
7 complaints about working at Kelly's?

8 A Not that I felt like people whispered or talked about me.  
9 I expressed to Angie when I talked to her on the phone the  
10 evening that I had worked with Troy, Kris, and Robin, and that  
11 there was a negative energy coming from the other side of the  
12 bar. And that Troy and I both witnessed it. And that it  
13 didn't feel good.

14 Q Do you recall Angie calling you after you no longer worked  
15 at Kelly's to find out more about why you left?

16 A No. I told Angie exactly why I was going the first time I  
17 talked to her.

18 Q How long before you left was that?

19 A Weeks. Because, like I said, Ryan needed help and Angie  
20 and Gene needed help. I knew that I came in to be hired there  
21 so I wasn't going to just drop them. That's not the type of  
22 employee I am. I actually told them they had the right to call  
23 me and ask me to work until they didn't need me. So I actually  
24 was communicating with Ryan especially until Ryan said I wasn't  
25 needed anymore and that's when I stopped working at Kelly's.



1 Q Do you remember complaining to Ms. Helms that you thought  
2 that Kris was talking about you?

3 A If anything I might have been trying to find out what was  
4 being said on the other end of the bar because I never worked  
5 with Kris when Robin wasn't there, except for my very last  
6 shift. But Robin was already gone by that point. She was no  
7 longer employed there. And that was a Saturday day shift.

8 Q In regards to your comments about the incident with Robin  
9 Helms and you said two African American women, isn't it correct  
10 the incident actually involved one black female employee --  
11 customer?

12 A No, it was two. And one of them used a credit card and  
13 the credit card was on the -- or the tip was on the credit  
14 card. There were two girls. They were with four other people,  
15 so there was a total of six. They sat at the window like right  
16 on the other side of Lancaster going up and down. The other  
17 people got there. And they really didn't drink much. They  
18 were celebrating graduating from school. They got like two  
19 drinks a piece. Then they came and closed out their tab. And  
20 the irony of it was one of the black girls came back and was  
21 like all over a white guy and she was still working there at  
22 that point, and on the bar with me, and I was like I guess she  
23 doesn't have a problem with white people. And I remember  
24 making that comment because she said -- Robin said to me maybe  
25 the only reason you got tipped was because you're black, too.

1 Q You referred to -- excuse me one second, Your Honor.

2 JUDGE CARISSIMI: Off the record.

3 (Off the record.)

4 JUDGE CARISSIMI: Mr. Faye, you may proceed.

5 MR. FAYE: Thank you very much, Your Honor.

6 BY MR. FAYE:

7 Q There was a Lisa, do you recall a Lisa who worked there  
8 for a day?

9 A No.

10 Q You referred to an employee who worked for a day.

11 A I don't know what her name was.

12 Q The employee who you referred to worked for a day, do you  
13 recall that she was trained by Kathy Karter --

14 A I don't recall.

15 Q -- and not by Robin?

16 A I don't recall. I remember her telling or Robin telling  
17 me about it.

18 Q Telling you about?

19 A The training. The girl was hired right around the same  
20 time I was hired. The only reason I know that the girl trained  
21 was because Robin told me.

22 Q Do you recall, and thinking back, I know it's a while, do  
23 you recall thinking back that it may have been a situation  
24 where Ms. Helms showed around one bar area to this employee but  
25 the training was actually by another person?

1 MR. SCHADLER: Objection, Your Honor. It's a compound  
2 question and it's vague.

3 JUDGE CARISSIMI: It is. And what's the relevance of  
4 this? We're pretty far afield, in my view.

5 MR. FAYE: Well, I think it has to do with just  
6 creditability and memory of it. I think there's holes.

7 JUDGE CARISSIMI: You've had a lot of time to develop  
8 that. I'm going to sustain the objection.

9 BY MR. FAYE:

10 Q Do you recall telling Ms. Mitchell that she needed to get  
11 rid of her staff?

12 A I recall telling Angie that changes needed to be made with  
13 the staff. I referenced things like uniform and other things.

14 Q What about the personnel, do you remember suggesting to  
15 her that she should dump her entire staff?

16 A No. I did not tell her to dump her whole staff, but I did  
17 tell her that refusing to serve clientele was going to get rid  
18 of your clientele.

19 Q Did you suggest to her that any particular people should  
20 be let go?

21 A I didn't tell her that any specific people should be let  
22 go. I did refer to the fact that I had a lot of management  
23 training and that there were things that I saw that I didn't  
24 think were acceptable. And I gave her suggestions as to things  
25 that I thought would be helpful if she chose to like make some

1 changes that would perhaps make things better for her bar and  
2 the employees.

3 (Pause.)

4 JUDGE CARISSIMI: Let's go off the record.

5 MR. FAYE: Thank you, Your Honor.

6 JUDGE CARISSIMI: Tell me when you're ready, Mr. Faye.

7 (Off the record.)

8 BY MR. FAYE:

9 Q Do you recall walking in on a conversation between Ms.  
10 Helms, Ryan Henry, and another employee?

11 A Is that the question?

12 MR. SCHADLER: Objection, vague.

13 JUDGE CARISSIMI: I'm going to sustain the objection.  
14 Could you ask a more precise question?

15 MR. FAYE: I will.

16 BY MR. FAYE:

17 Q Do you recall a conversation between -- that you were  
18 present for between Robin Helms, another employee, and Ryan  
19 Henry, the manager, about shifts?

20 A Where in the restaurant? I mean, I'm sorry, I don't know  
21 if I can ask questions, but --

22 Q In the basement.

23 A I do remember coming downstairs in the basement. I  
24 remember just saying earlier that -- I don't know if I said it  
25 earlier, at this point. I came downstairs for just a couple of

1 seconds. It was right when I started training. I mentioned  
2 the fact that Robin was concerned about her shift scheduling,  
3 that new employees were not supposed to affect her scheduling.  
4 I came down for like two seconds. I think that I was supposed  
5 to get an employee number or something. And then I went back  
6 upstairs and Robin told me, because it was Kris, Ryan, and  
7 Robin, that she had been downstairs with Kris to talk to Ryan  
8 about their scheduling.

9 Q Yeah.

10 A And they did not want their schedules affected by any  
11 newcomers, that they wanted an assurance that -- well, Robin  
12 said to me she wanted to be ensured that no one new was going  
13 to take any shifts away from her.

14 Q Is the Kris that you're referring to --

15 A Female Kris. That's the only Kris I recall.

16 Q Okay, thank you.

17 MR. FAYE: Your Honor, may I have a moment to decide  
18 whether to do something here with the affidavit or leave it be.

19 JUDGE CARISSIMI: Off the record.

20 (Off the record.)

21 MR. FAYE: I'm going to show the affidavit now.

22 JUDGE CARISSIMI: Let's have the affidavit marked. What  
23 number do you want to give it?

24 MR. FAYE: 6.

25 JUDGE CARISSIMI: Yes, you have no GC-6. Okay, GC-6.



1 (General Counsel's GC-6 identified.)

2 MR. FAYE: Your Honor, if I may, I just want to explain on  
3 the record one thing about the affidavit. There was a -- the  
4 board agent sent a letter, a cover letter with the affidavit, a  
5 draft affidavit, to the witness. And Ms. Heyward, on the back  
6 of the letter, she added some comments from which she  
7 initialed. And to me, nothing too technical about it, I take  
8 it as part of the affidavit.

9 JUDGE CARISSIMI: Absolutely.

10 MR. FAYE: I just want to point out that it was on the  
11 back of the letter.

12 JUDGE CARISSIMI: Thank you very much.

13 MR. FAYE: It was outside of the affidavit from. It was  
14 not between --

15 JUDGE CARISSIMI: It's clearly the witness has adopted it  
16 from --

17 MR. FAYE: It was not between her name and the signatures,  
18 this addition, so I took it as a part.

19 MR. SCHADLER: Yes. As long as she authenticates it, Your  
20 Honor.

21 JUDGE CARISSIMI: I agree with that completely. All  
22 right. This is GC-6, okay, you may proceed.

23 MR. FAYE: You know, Your Honor, you said I really don't  
24 have to put it in --

25 JUDGE CARISSIMI: Correct.

1 MR. FAYE: -- as a document, that I could just show it to  
2 her.

3 JUDGE CARISSIMI: Right, to have it authenticated to make  
4 sure. Then if you have questions, you can go from there.

5 MR. FAYE: I would like rather to do that than mark it as  
6 a General Counsel exhibit.

7 JUDGE CARISSIMI: Anything that's shown the witness has to  
8 be marked in my courtroom.

9 MR. FAYE: Oh, okay, that's fine.

10 JUDGE CARISSIMI: So it's GC-6. And you can ask the  
11 witness questions about GC-6 to authenticate it.

12 BY MR. FAYE:

13 Q Ms. Heyward, can you please take a look at the signature  
14 at the bottom of Page 2. Is that your signature?

15 A Yes.

16 Q And are those your initials on the bottom of Page 1 and  
17 the bottom of Page 2?

18 A Yes.

19 Q On the extra paragraph that's just on a sheet by itself,  
20 the third page, are those your initials as well?

21 A Yes.

22 Q And the bottom of Page 2 indicates that the board agent  
23 who took the affidavit is Christy, C-H-R-I-S-T-Y, Bergstresser,  
24 that was spelled on the record before. Is that correct? Do  
25 you recall talking to her on the telephone to give this

1 affidavit?

2 A I did talk to her on the phone, yes.

3 Q And taking a look at the affidavit on the first page,  
4 second line, do you recall, now taking a look and reading that  
5 second sentence --

6 JUDGE CARISSIMI: First, are you going to refresh  
7 recollection?

8 MR. FAYE: Yes.

9 JUDGE CARISSIMI: Ask her to read --

10 MR. FAYE: The second sentence.

11 JUDGE CARISSIMI: Read it to yourself and tell us when  
12 you're done.

13 THE WITNESS: The second sentence on the second page?

14 BY MR. FAYE:

15 Q Well, no, on the first page, the first sentence -- I  
16 should say the second sentence. Ms. Heyward, I want to call  
17 attention to the paragraph that began with I worked as a  
18 bartender.

19 A Right.

20 Q I would like to call attention now to the paragraph the  
21 night I began working there.

22 A Yes.

23 Q Do you recall now is it accurate that when you began  
24 working at Kelly's that the employees were very mean because  
25 they felt they were going to lose hours?

1 A I felt as though, yeah, I felt like they weren't nice and  
2 they expressed that they were worried about their hours.

3 Q Would you agree with sentence that's in the affidavit?

4 MR. SCHADLER: Your Honor --

5 JUDGE CARISSIMI: Well, hold it. If you're going to use  
6 it to refresh recollection, you have the person read it, you  
7 take it back, you ask a question, right? If you don't get the  
8 answer you think is appropriate, then you go onto the  
9 affidavit. But if you're really using it to refresh  
10 recollection that's the way we're going to do it.

11 MR. FAYE: Yeah, okay. True.

12 JUDGE CARISSIMI: Now if you're using it to impeach her,  
13 that's when you read from the affidavit. I don't need the  
14 witness to read from the affidavit. You have the affidavit.  
15 You can read it, but put it in quotes if you read from the  
16 affidavit. If you think there is something in the testimony  
17 that you feel the need to impeach or that you think is  
18 somehow --

19 MR. FAYE: It's for impeachment purposes, so therefore I  
20 will just quote that second sentence.

21 JUDGE CARISSIMI: All right. We don't need -- it's  
22 authenticated. We're going to have you take the affidavits  
23 back. I guess I will keep mine for now. No, counsel gets to  
24 keep it if you're going to use the affidavit if you're going to  
25 quote from it because he needs to make sure it's accurate.

1 Okay?

2 MR. FAYE: Take them back from the court reporter?

3 JUDGE CARISSIMI: No, no. From the court reporter,  
4 because it's not introduced, and from the witness because it's  
5 her affidavit. We want to --

6 MR. FAYE: If I may leave one here because I'm going to be  
7 asking other questions and going back and forth.

8 JUDGE CARISSIMI: You certainly may.

9 MR. FAYE: So if I may just turn it over.

10 JUDGE CARISSIMI: Let me put it this way, the witness has  
11 authenticated the affidavit.

12 MR. FAYE: Yes.

13 JUDGE CARISSIMI: If you think there's impeaching  
14 statements in there just read it into the record, because now  
15 I'm satisfied it's her affidavit. Okay? We don't need to have  
16 her keep going back to the affidavit. The affidavit is  
17 authenticated.

18 COURT REPORTER: So it's not going to be an exhibit?

19 JUDGE CARISSIMI: I don't know that yet. Not now.

20 MR. FAYE: I'm not planning on introducing it. But, Your  
21 Honor, just for the sake of time and I realize that it's late,  
22 if I read the statements that are of concern to me in the  
23 record, you're asking then for her to --

24 JUDGE CARISSIMI: There's been so much testimony on this,  
25 on these issues, just read in what you think is contradictory



1 and you can argue to me in your briefs whether it is or not.

2 But that's the way we're going to do it.

3 MR. FAYE: Okay, fine.

4 JUDGE CARISSIMI: Everything you're going to go over  
5 you've covered several times. It's been on direct. It's been  
6 on cross. So go ahead.

7 MR. FAYE: I hear you. Thank you very much. Does this --

8 JUDGE CARISSIMI: So when you quote, you have to tell us  
9 the page.

10 MR. FAYE: Yes, Page 1.

11 JUDGE CARISSIMI: There's no line numbers on here. Give  
12 us some direction. Say quote and then end quote. Okay?

13 MR. FAYE: I am looking at Page 1 with the paragraph that  
14 began with "I worked as." And I am quoting for impeachment  
15 purposes the next line which says, "When I began working there,  
16 the employees were very mean because they felt they were going  
17 to lose hours." I am also for impeachment purposes looking to  
18 the very next sentence, "From the moment that I got there, I  
19 got the complete cold shoulder from every employee." So I've  
20 read those two direct quotes.

21 JUDGE CARISSIMI: And that's end quote after "every  
22 employee."

23 MR. FAYE: Yes. Yes, beginning of the quote, "From the  
24 moment I got there," to the end quote, "I got the complete cold  
25 shoulder from every employee."

1           Also looking at Page 1, in the last paragraph on Page 1  
2   that begins with "One night," the second sentence says, quote,  
3   "A pretty black patron sat at the bar; the trainer stated 'I am  
4   not going to wait on her.'" This has to do with, Your Honor,  
5   the testimony of the witness that there were two --

6           JUDGE CARISSIMI: I know what it goes to, sir.

7           MR. FAYE: Oh, okay. Okay.

8           JUDGE CARISSIMI: I've listened to the testimony. You  
9   don't need to tell me.

10          MR. FAYE: Okay. And on Page 1, she -- I'm calling  
11   attention to the last two full sentences of Page 1, which is,  
12   quote, "She stated I'm not waiting on that black girl, she  
13   doesn't tip. It was very obvious that she was being racist  
14   against the patron," end of quote.

15          Turning to Page 2, Your Honor, I'm calling attention here  
16   for impeachment purposes to the first full sentence, quote, "I  
17   told Angie that I felt that she needed to get rid of her  
18   staff," unquote.

19          Also, the beginning of Sentence 3, well, the second full  
20   sentence on Page 2 where it says, quote, "I told Angie about  
21   the interaction where the trainer refused to serve the black  
22   patron," it continues on, but I'm looking at that part of the  
23   sentence of the quote.

24          Looking much further down the page, Your Honor, it is the  
25   sentence that begins with "another female bartender." I am

1 quoting the sentence toward the end of Page 2 that says, quote,  
2 "Another female bartender and the bartender who trained me were  
3 always talking about me and whispering about me," unquote.

4 And the next sentence which says, "Another male, Troy,  
5 bartender, and I agreed that the staff was very unhappy,"  
6 unquote.

7 MR. SCHADLER: At this point, may I just recommend that we  
8 admit the entire document? We've read 60 percent of it.

9 JUDGE CARISSIMI: Mr. Faye, again, that's up to you, Mr.  
10 Schadler, but the other side when you use an affidavit and the  
11 other side feels that for me to understand the context the  
12 document has to come in, that's what I'm going to do. And a  
13 lot of it has come in.

14 MR. SCHADLER: I'd move for its admission.

15 JUDGE CARISSIMI: I'm going to admit, well, we're going to  
16 wait for you to get your turn. But I'll tell you right now I'm  
17 going to admit it because we read half of it into the record  
18 already.

19 MR. FAYE: Excuse me, Your Honor.

20 JUDGE CARISSIMI: Yes.

21 (Pause.)

22 JUDGE CARISSIMI: Anything further, Mr. Faye? And you  
23 don't need to read anything further because I've already told  
24 you I'm going to introduce the whole thing when Mr. Schadler  
25 makes the motion, when he gets his turn.

1 MR. FAYE: You've already made a ruling, Your Honor, so --

2 JUDGE CARISSIMI: I have.

3 MR. FAYE: I hear you.

4 JUDGE CARISSIMI: All right. Are you finished?

5 MR. FAYE: That's it.

6 JUDGE CARISSIMI: All right. Mr. Schadler?

7 MR. SCHADLER: Move to admit the document, Your Honor.

8 JUDGE CARISSIMI: General Counsel's 6 is admitted.

9 MR. SCHADLER: Thank you.

10 (General Counsel's GC-6 received.)

11 JUDGE CARISSIMI: And the basis for it is a rule that  
12 indicates that when portions of an affidavit or any prior  
13 statement having been read into the record, the other side has  
14 the ability if they feel that in order for me to understand the  
15 proper context of those statements that were used to impeach,  
16 the entire document should come in.

17 In this case, over half the document was read into the  
18 record. So I think certainly the context of it, for my  
19 purposes, is better understood by admitting the whole  
20 affidavit. That's the basis for my admission of it.

21 MR. SCHADLER: Thank you.

22 JUDGE CARISSIMI: Do you have any redirect?

23 MR. SCHADLER: I'm going to be as brief as brief can be.

24 JUDGE CARISSIMI: Thank you, sir.

25 MR. SCHADLER: I will be as focused as I can be.

1 MR. FAYE: Based on what you're representing, Your Honor,  
2 I'm not objecting.

3 JUDGE CARISSIMI: All right, thank you very much.

4 REDIRECT EXAMINATION

5 BY MR. SCHADLER:

6 Q Chelsea --

7 A Yes.

8 Q -- going to your phone conversation with Angie, did you  
9 express concerns about Robin finding out that you had provided  
10 this information to Angie?

11 A Yes.

12 Q What did you tell Angie?

13 A That I asked her to please not share the information that  
14 I had expressed because I didn't want it to -- I didn't want it  
15 to be a negative thing directed solely towards Robin. That I  
16 just didn't want to be a bad person about it. I was sharing my  
17 concerns as to why I wanted to leave.

18 Q And in looking at the exhibit that was just admitted,  
19 specifically when you say that all the employees -- that every  
20 employee was, when you got the cold shoulder, were you  
21 referring to specific people?

22 A Yes.

23 Q Who were you referring to?

24 A Well, especially the fact that I say from the moment I got  
25 there, Robin was the main person that I trained with from the



1 gate or the beginning. And I felt like it was negative energy  
2 from the first day that I worked with Robin.

3 Q Was there anyone else you were referring to when you said  
4 every employee?

5 A The first day that I actually worked with Kris was a  
6 night, it was a Thursday night when we had the people in, and  
7 so that was the next person that I felt was the negative  
8 person.

9 Q Anyone other than Kris or Robin?

10 A No.

11 MR. SCHADLER: Your Honor, with that, as promised, nothing  
12 further.

13 JUDGE CARISSIMI: Thank you very much. I take it then  
14 that --

15 MR. FAYE: Nothing, Your Honor.

16 JUDGE CARISSIMI: Nothing further. Ms. Heyward, you are  
17 excused as a witness. Thank you very much.

18 MR. SCHADLER: May she be released from her subpoena, Your  
19 Honor?

20 JUDGE CARISSIMI: Yes.

21 MR. SCHADLER: Thank you.

22 JUDGE CARISSIMI: You are released from your subpoena.  
23 You are finished with this hearing.

24 THE WITNESS: Thank you.

25 (Witness excused.)

1 JUDGE CARISSIMI: Okay. With that, we are off the record.  
2 As I said, the official start of the hearing tomorrow will be  
3 10:00. If people can get here earlier and everybody is here,  
4 if it's 9:45 or thereabouts, we will start. But I'm going to  
5 make it clear that if people get delayed and they're not here  
6 until 10:00, that's the official start of the hearing.

7 (Whereupon, at 6:47 p.m., the above-entitled matter was  
8 adjourned, to reconvene on Thursday, March 24, 2016, at  
9 10:00 a.m.)

10

1

C E R T I F I C A T E

This is to certify that the attached proceedings done before  
the NATIONAL LABOR RELATIONS BOARD REGION FOUR

In the Matter of:

MID-ATLANTIC RESTAURANT GROUP LLC, d/b/a KELLY'S TAPROOM,  
Respondent,

And

ROBIN C. HELMS, An Individual,  
Charging Party.

Case No.: 04-CA-162385

Date: March 23, 2016,

Place: Philadelphia, Pennsylvania

Were held as therein appears, and that this is the original  
transcript thereof for the files of the Board

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